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# TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, ~~1912~~. 1913

No. ~~647~~ 256

THE UNITED STATES, APPELLANT,

vs.

NELSON P. VULTE.

APPEAL FROM THE COURT OF CLAIMS.

FILED MAY 11, 1912.

(23208)

# SUPREME COURT OF THE UNITED STATES,

## OCTOBER TERM, 1912.

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## No. 647.

THE UNITED STATES, APPELLANT,

vs.

NELSON P. VULTE.

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APPEAL FROM THE COURT OF CLAIMS.

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1 Court of Claims.

NELSON P. VULTE
*v.*
THE UNITED STATES. } No. 30481.

*I. Petition and amended petition.*

On the 12th day of August, 1909, the claimant filed his petition. Subsequently, to wit, on the 5th day of March, 1912, by leave of court, the claimant filed his amended petition, as follows:

Amended petition.

*To the honorable the Court of Claims:*

The claimant, Nelson P. Vulte, respectfully represents:

I. During the times hereinafter mentioned he was a first lieutenant in the United States Marine Corps.

II. On June 27, 1908, in obedience to competent orders, he sailed from New York for Porto Rico, where he arrived and reported July 2, 1908. He continued on duty in Porto Rico until November 3, 1909, when he was detached and sailed for the United States, where he arrived November 8, 1909.

III. During said period he was paid the pay of the first lieutenant of Infantry in the United States Army of less than five years' service up to and including June 29, 1908, and of over five years' service from and after June 30, 1908. He claims to be entitled to ten per cent (10%) addition for service beyond seas, amounting to
2 two hundred ninety-nine dollars and seventy-eight cents ($299.78).

IV. This claim is based upon the following statutes: Revised Statutes, section 1612; March 30, 1902, 32 Stat. L., 512; May 11, 1908, 35 Stat. L., 110.

V. This claim has not been presented to the accounting officers of the Treasury Department because the questions involved have already been decided adversely. (13 Comp. Dec., 14 Comp. Dec., 841.)

VI. No assignment or transfer of this claim, or of any part thereof or interest therein, has been made; and the claimant is justly entitled to the amount herein claimed from the United States after allowing all just credits and offsets. The claimant is a citizen of the United States. And the claimant claims two hundred and ninety-nine dollars and seventy-eight cents ($299.78).

KING & KING,
*Attorneys for Claimant.*

DISTRICT OF COLUMBIA, *ss:*

William W. King, being duly sworn, deposed and says: I am one of the attorneys for the claimant in this case. I have read the above

petition, and the matters therein stated are true, to the best of my knowledge and belief.

WM. B. KING,
*Signature of Claimant.*

Subscribed and sworn to before me this 27 day of March, 1912.

[SEAL.] MARIE A. SEARLES,
(Official signature.)
*Notary Public.*
(Official title.)

3 *II. Traverse, filed March 5, 1912.*

In the Court of Claims of the United States.

DECEMBER TERM, A. D. 1911.

NELSON P. VULTE
*vs.*
THE UNITED STATES. } No. 30481.

And now comes the Attorney General, on behalf of the United States, and, answering the petition of the claimant herein, denies each and every allegation therein contained; and asks judgment that the petition be dismissed.

JOHN Q. THOMPSON,
*Assistant Attorney General.*

4 *III. Argument and submission of case.*

On the 5th day of March, 1912, this case came on to be heard. Mr. George A. King was heard in behalf of the claimant; Mr. Frederick DeC. Faust was heard for the defendants, and the case was submitted.

5 *IV. Findings of fact and conclusion of law and opinion of the court. Filed April 1, 1912.*

This case having been heard by the Court of Claims, the court, upon the evidence, makes the following

Findings of fact.

I. The claimant, Nelson P. Vulte, was appointed a second lieutenant in the United States Marine Corps from June 30, 1903; accepted the appointment and executed the required oath of office July 13, 1903. He was promoted to first lieutenant from March 3, 1904.

The claimant, under orders assigning him to duty in Porto Rico, with station at San Juan, P. R., sailed from New York for Porto Rico June 27, 1908, and served there until November 3, 1909, when detached and ordered back to the United States. From November 4 to 8, 1909, he was on the return voyage to New York.

II. If it is held that claimant is entitled to 10 per cent for service in Porto Rico from June 27, 1908, date of sailing from New York, to November 3, 1909, date of detachment, there would accrue to him the sum of $296.72, as follows:

| | |
|---|---|
| Pay from June 27, 1908, to July 12, 1908, 16 days, at $2,000 | $88.89 |
| 10 per cent on above for shore duty in Porto Rico | 8.89 |
| Pay from July 13, 1908, to November 3, 1909, 1 year 3 months and 21 days, at $2,200 | 2,878.33 |
| 10 per cent on above for shore duty in Porto Rico | 287.83 |
| Total | 3,263.94 |
| Less amount paid | 2,967.22 |
| Total | 296.72 |

If entitled to 10 per cent additional pay while en route from Porto Rico to New York from November 4 to 8, 1909, there would accrue to him the sum of $3.06.

Total difference in pay, $299.78.

6 Conclusion of law.

Upon the foregoing findings of fact the court decides as a conclusion of law that the plaintiff is entitled to judgment of and from the United States in the sum of two hundred and ninety-nine dollars and seventy-eight cents ($299.78).

Opinion.

BOOTH, Judge, delivered the opinion of the court.

The plaintiff is a first lieutenant in the Marine Corps. On June 27, 1908, in obedience to proper orders, he sailed from New York for Porto Rico, remaining on duty there until November 3, 1909, when detached and ordered back to the States. This suit is to recover 10 per cent additional pay for services in Porto Rico, dating said service from the time of departure from the United States until return thereto.

The plaintiff's pay proper was originally fixed by section 1612, R. S., as follows:

"The officers of the Marine Corps shall be entitled to receive the same pay and allowances, and the enlisted men shall be entitled to receive the same pay and bounty for reenlisting, as are or may be provided by or in pursuance of law for the officers and enlisted men of like grades in the Infantry of the Army."

On June 30, 1902 (32 Stat. L., 512), as part of the appropriation act for the Army, the Congress modified existing law respecting the pay proper of officers of this grade by the following language:

"For additional ten per centum increase on pay of commissioned officers serving at foreign stations, four hundred and fifty-one thousand four hundred and fifty-six dollars: Provided, That hereafter the pay proper of all commissioned officers and enlisted men serving beyond the limits of the States comprising the Union and the Terri-

tories of the United States contiguous thereto shall be increased ten per centum for officers and twenty per centum for enlisted men over and above the rates of pay proper as fixed by law for time of peace, and the time of such service shall be counted from the date of departure from said States to the date of return thereto."

Thus far the rights of plaintiff respecting pay are obvious; the complications arise by subsequent legislation.

Following this statute, on June 12, 1906 (34 Stat. L., 247), Congress provided—

"For additional ten per centum increase on pay of commissioned officers serving beyond the limits of the States comprising the Union and the Territories of the United States contiguous thereto (excepting Porto Rico and Hawaii), as provided by act approved June thirtieth, nineteen hundred and two, the time of such service to be counted from the date of departure from said States to the date of return thereto * * *."

The Army appropriation act of the next session of Congress repeated the above provisions (34 Stat. L., 1164).

The act of May 11, 1908 (35 Stat. L., 110), provided as follows:

"That increase of pay for service beyond the limits of the States comprising the Union and the Territories of the United States contiguous thereto shall be as now provided by law.

* * * * * * *

7 "For additional ten per centum increase on pay of officers on foreign service, two hundred and eighty-five thousand dollars.

* * * * * * *

"That nothing herein contained shall be construed so as to reduce the pay or allowances now authorized by law for any officer or enlisted man of the Army; and all laws or parts of laws inconsistent with the provisions of this act are hereby repealed."

Defendants' contention is rested upon the language as found in the act of May 11, 1908, asserting that the words "shall be as now provided by law" refer specifically to the exceptions contained in the two preceding enactments, limiting the additional pay of officers in foreign service to foreign shores other than Porto Rico and Hawaii.

It is always difficult to distinguish permanent from temporary legislation when conflicting enactments are made part of general appropriation laws. Just what the Congress intended by repeated changes respecting the same subject matter contained in annual appropriations for the Army presents questions of law most frequently doubtful. There is no language in the acts of June 12, 1906, and March 2, 1907, indicating an express intention to repeal the act of June 30, 1902; the usual expressions employed to effectuate such a purpose are absent. The authorities seem to hold that a mere appropriation act, whereby a smaller sum is appropriated to pay a larger compensation previously fixed by statute, does not of itself repeal existing

law. (United States v. Langston, 118 U. S., 389; Converse v. United States, 26 C. Cls., 6.) There is no reason assigned and no argument advanced for this apparent discrimination and its continuance under subsequent statutes. Commencing in 1902 no discrimination respecting pay for foreign service obtained until 1906. During this and the following year service at Porto Rico and Hawaii was excepted in so far as funds available for payment for such service were concerned, but notwithstanding this apparent decrease in pay for foreign service, we find a substantial increase in each succeeding appropriation bill to meet the additional pay for services of this character. (35 Stat. L., 155.)

The Comptroller of the Treasury, in 10 Comp. Dec., 849, overruled a contention similar in most respects to the defense interposed here, and gave the additional pay in the face of a statute expressly enumerating the foreign shores to which such increase was made applicable.

Taking the legislation as a whole, and in view of the absence of any express language indicating an intention to repeal the act of June 30, 1902, and the apparent doubt as to such an intention, the plaintiff is entitled to prevail. Judgment for the plaintiff in the sum of $299.78. It is so ordered.

8 *V. Judgment of the court.*

At a Court of Claims held in the city of Washington on the first day of April, A. D. 1912, judgment was ordered to be entered as follows:

The court, upon due consideration of the premises, find in favor of the claimant, and do order, adjudge, and decree that the said Nelson P. Vulte, claimant, do have and recover of and from the United States the sum of two hundred and ninety-nine dollars and seventy-eight cents ($299.78).

By the Court.

9 *VI. Application for and allowance of appeal.*

From the judgment rendered in the above-entitled cause on the 1st day of April, 1912, in favor of claimant, the defendants, by their Attorney General, on the 23rd day of April, 1912, make application for and give notice of an appeal to the Supreme Court of the United States.

John Q. Thompson,
*Assistant Attorney General.*
F. DeC. F.

Filed April 23, 1912.

Ordered: That the above appeal be allowed as prayed for.

By the Court.

May 6, 1912.

10 In the Court of Claims.

NELSON P. VULTE
*vs.*
THE UNITED STATES. } No. 30481.

I, John Randolph, assistant clerk of the Court of Claims, certify that the foregoing are true transcripts of the pleadings in the above-entitled cause; of the findings of fact and conclusion of law filed by the court; of the opinion of the court; of the final judgment of the court; of the application of the defendants for and the allowance of appeal to the Supreme Court of the United States.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court of Claims this 7th day of May, 1912.

[SEAL.]

JOHN RANDOLPH,
*Assistant Clerk Court of Claims.*

(Indorsement on cover:) File No. 23,208, Court of Claims. Term No. 647. The United States, appellant, *vs.* Nelson P. Vulte. Filed May 11th, 1912. File No. 23,208.

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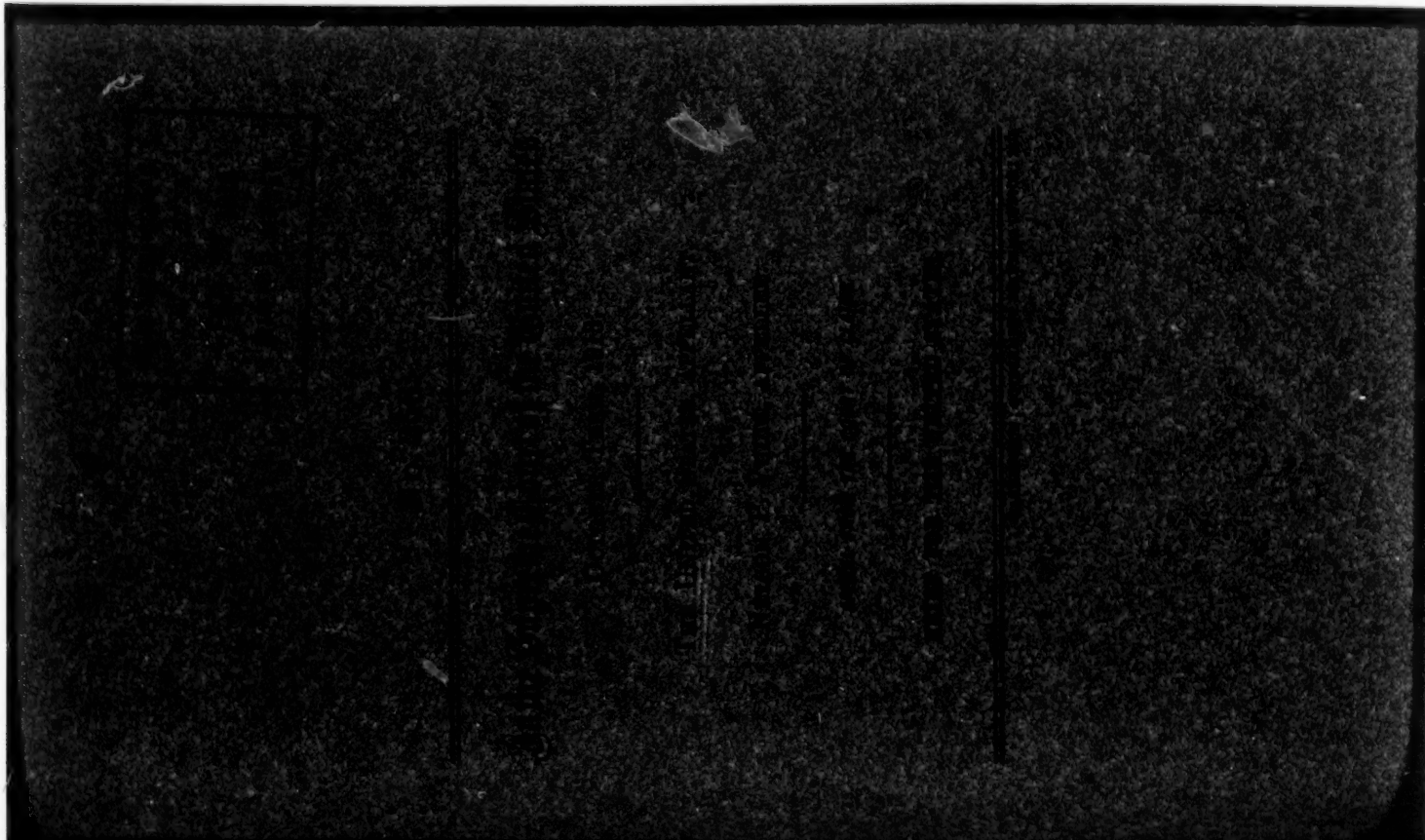

# In the Supreme Court of the United States.

OCTOBER TERM, 1913.

THE UNITED STATES, APPELLANT,
*v.*
NELSON P. VULTE.
No. 256.

*APPEAL FROM THE COURT OF CLAIMS.*

## BRIEF FOR THE UNITED STATES.

### STATEMENT.

This is what is termed a "class" case, in that if the judgment of the lower court is sustained, it will recognize the right of all officers and enlisted men in the Army to increase of pay for service in Hawaii and Porto Rico since June 30, 1906, and will, therefore, have a far-reaching effect.

The action instituted in the Court of Claims by appellee was one to recover ten per centum additional of his pay as a first lieutenant, United States Marine Corps, for the period from June 27, 1908, to November 9, 1909, alleged to be due him on account of foreign service.

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Appellee entered the Marine Corps as a second lieutenant July 13, 1903, and was promoted to the grade of first lieutenant March 3, 1904.

On June 27, 1908, and while still in that grade he sailed from New York for Porto Rico under proper orders assigning him to duty at that place. He served there continuously from the date of his arrival until November 3, 1908, when he was detached and ordered back to the United States, where he arrived on November 8, 1909.

During this period from June 27, 1908, to November 9, 1909, he received the pay of a first lieutenant in the Army, which was the normal pay prescribed for first lieutenants in the Marine Corps by section 1612, Revised Statutes.

The contention of appellee is that Porto Rico is a foreign station and that service there carries 10 per centum additional compensation from the date of departure from the United States to the date of return thereto within the meaning of the following enactments:

Act of May 11, 1908 (35 Stat. 110):

> That increase of pay for service beyond the limits of the States comprising the Union and the Territories of the United States contiguous thereto shall be as now provided by law.

Act of June 30, 1902 (32 Stat., 512):

> For additional ten per centum increase on pay of commissioned officers serving at foreign stations, four hundred and fifty-one thousand four hundred and fifty-six dollars: *Provided*,

> That hereafter the pay proper of all commissioned officers and enlisted men serving beyond the limits of the States comprising the Union and the Territories of the United States contiguous thereto shall be increased ten per centum for officers and twenty per centum for enlisted men over and above the rates of pay proper as fixed by law for time of peace, and the time of such service shall be counted from the date of departure from said States to the date of return thereto.

The Court of Claims upheld appellee's contention and rendered judgment in his favor in the aggregate sum of $299.78.

## GROUNDS OF APPEAL.

Appellants maintain that the Court of Claims erred in this decision for two reasons:

First. Because the act of May 11, 1908, merely adopted the then-existing definition of "foreign stations" as determined by statutes enacted subsequent to 1902, wherein service should carry additional compensation.

Second. Because in 1908, the statutory definition did not include Porto Rico and Hawaii, for the reason that the territory defined in the act of June 30, 1902, had been cut down so as to exclude Porto Rico and Hawaii. In other words, the territorial definition so far as it related to Porto Rico and Hawaii had been repealed by the Army appropriation acts of April 23, 1905, June 12, 1906, and March 2,

1907, by virtue of the following provisions of those acts:

Act of April 23, 1904 (33 Stat., 266):

For additional twenty per centum increase on pay of enlisted men serving in the Philippine Islands, the island of Guam, Alaska, China, and Panama, five hundred and thirty-three thousand four hundred and twelve dollars and fifty-one cents.

For additional ten per centum increase on pay of commissioned officers serving in the Philippine Islands, the island of Guam, Alaska, China, and Panama, one hundred and sixty-seven thousand four hundred and twenty-six dollars and thirty cents.

Act of March 2, 1905 (33 Stat., 832):

(Same except as to amounts appropriated.)

Act of June 12, 1906 (34 Stat., 247):

For additional twenty per centum increase on pay of enlisted men serving beyond the limits of the States comprising the Union and the Territories of the United States contiguous thereto (*excepting Porto Rico and Hawaii*), as provided by act approved June thirtieth, nineteen hundred and two, the time of such service to be counted from the date of departure from said States to the date of return thereto, five hundred and forty thousand three hundred and sixty-nine dollars and forty-eight cents.

For additional ten per centum increase on pay of commissioned officers serving beyond the limits of the States comprising the Union and the Territories of the United States

contiguous thereto (*excepting Porto Rico and Hawaii*), as provided by act approved June thirtieth, nineteen hundred and two, the time of such service to be counted from the date of departure from said States to the date of return thereto, two hundred thousand two hundred and one dollars and thirty-nine cents: *Provided*, That the appropriations for pay of the Army for the fiscal years ending June thirtieth, nineteen hundred and five, and June thirtieth, nineteen hundred and six, shall be available for the payment of the increase for service at foreign stations to which commissioned officers and enlisted men are entitled under the provisions of the act of June thirtieth, nineteen hundred and two.

## ARGUMENT.

The act of May 11, 1908, shows on its face that it merely adopted the existing definition of "foreign stations," for it declared that extra compensation should be allowed for foreign service "as now provided by law." Since the definition of "foreign stations" given in the act of June 30, 1902, unquestionably included Porto Rico, the only question before the court is whether that definition still included Porto Rico when the act of May 11, 1908, was enacted; or more precisely, whether it had been limited so as to exclude Porto Rico and to that extent repealed by the act of April 23, 1904, and the three succeeding Army appropriation acts. We present our views under two points:

## FIRST.

**Congress had the power to repeal general salary or compensation acts through special appropriation acts. When such a repeal is claimed the question is determined by the intention of Congress.**

This proposition is conclusively established by the following cases:

*United States* v. *Fisher* (109 U. S., 143):

Action to recover a balance of salary as judge of a Territorial court in Wyoming, alleged to be due by reason of payment at rate of $2,600, the amount specially appropriated instead of at rate of $3,000, the salary prescribed by the general salary act relative to judges of Territorial courts. Held that a general salary act is not a contract by Congress not to reduce the salaries provided and that the Constitution does not prohibit reductions; that a *pro tanto* repeal of a general act by an appropriation act appropriating a smaller amount is exclusively a question of the intension of Congress, and that the appropriation of $2,600 "in full compensation" showed an intention to effect a *pro tanto* repeal of the earlier general act prescribing $3,000 per annum.

*United States* v. *Mitchell* (109 U. S., 146):

Appropriation of $300 per annum for five consecutive years, together with a lump sum each year for extra compensation to be distributed in the discretion of the Secretary of the Interior, held to have repealed the earlier general act fixing the salaries of Indian interpreters at $400.

*Matthews* v. *United States* (123 U. S., 184).
*Wallace* v. *United States* (133 U. S., 180).
*McKinstry* v. *United States* (40 Fed., 519).

**SECOND.**

**The Army appropriation act of April 23, 1904, was intended to redefine the definition of "foreign stations" given in the act of June 30, 1902, so as to exclude Porto Rico and Hawaii; it repealed the act of June 30, 1902, to that extent.**

The act of April 23, 1904, instead of appropriating for extra compensation for foreign service generally, as the act of June 30, 1902, had done, was specific and appropriated only for service in the Philippine Islands, the Island of Guam, Alaska, China, and on the Isthmus of Panama. It *entirely omitted Porto Rico and Hawaii.*

It may be argued that this was an oversight or in any event of no significance. However a failure to appropriate for service at two such important stations in 1904, together with the fact that the same course was pursued the following year, raises a strong presumption that a real inconsistency between the two acts was intended, and that the act of April 23, 1904, therefore repealed *pro tanto* the act of June 30, 1902. This presumption is strengthened by reason of the act concluding with a repealing clause, as follows:

> And all laws or parts of laws inconsistent with the provisions of this act are hereby repealed. (33 Stats., 276.)

Furthermore, the presumption is apparently crystallized into a conclusion through the provisions of the act of June 12, 1906.

That act appropriated for extra compensation for foreign service, as provided by the act of June 30, 1902 "(*excepting Porto Rico and Hawaii*)," with the express proviso, however, that the appropriations for Army pay for the fiscal years ending June 30, 1905, and June 30, 1906, respectively, should be available for service at foreign stations during those two years, as provided by the act of June 30, 1902.

The House conference managers for the joint conference between the two Houses of Congress that preceded the final passage of the act of 1906 explained this provision, which was inserted by the Senate, as follows (H. Rept. No. 4644, 59th Cong., 1st sess., p. 3, vol. 4908 H. Repts. (public), 59th Cong., 1st sess.):

> Amendments Nos. 37 and 38 strike out the House provision for the payment of additional compensation of officers serving beyond the limits of the United States; and amendments Nos. 39 and 40 change the language of the House provision so as to comply with the law, as the Comptroller of the Currency now holds should be done to make the law effective; and the House recedes from its disagreement to all four amendments.

So that under existing law in 1906 Porto Rico and Hawaii could not have been "foreign stations," for in stating the existing law more definitely, the act of June 12, 1906, plainly excluded Porto Rico and Hawaii from that category: *expressly* by the term "(excepting Porto Rico and Hawaii)"; and impliedly by the proviso in the act of 1906, making available

Army appropriations for the fiscal years ending June 30, 1905 and 1906, respectively, for increased pay for service at foreign stations, etc.

The Comptroller of the Treasury had previously held, but subsequent to the passage of the act of April 23, 1904, that that act had not repealed the definition of "foreign stations" given in the act of June 30, 1902, or excluded Porto Rico and Hawaii; so that this proviso shows conclusively that Congress, although willing to accept the consequences of the Comptroller's decision for the two years preceding the act of 1906, intended to annul it for the future and to put an end absolutely to the payment of additional compensation for service in Porto Rico and Hawaii.

Finally, the legislative history of the act of April 23, 1904, shows that its exclusion of Porto Rico and Hawaii from the category of "foreign stations" was founded on good and reasonable grounds.

The report of the Senate Committee on Military Affairs, which inserted the provision in question as an amendment to the House bill, although it did not explain that particular amendment, contained the following explanation of an amendment allowing enlisted men double the time of their actual service in Cuba, China, the Philippine Islands, the island of Guam, Alaska, and the Isthmus of Panama, but not for the service in Porto Rico and Hawaii (32 Stat., 462–5), for the purpose of computing the length of their service for the purposes of retirement:

> On page 16, lines 18 to 23, insert an amendment, extending to enlisted men serving in the island of Guam, Alaska, and on the Isthmus of Panama the same benefit in computing length of service for retirement as has heretofore been extended for service in China, Cuba, and the Philippine Islands, *and forbidding the right of such benefit for service hereafter rendered in Porto Rico and the Territory of Hawaii, where service is no longer onerous.* (Italics ours.)

(S. Rept. No. 1199, 58th Cong., 2d sess., p. 8, vol. 4573 S. Repts. (public)).

In the Senate's opinion, therefore, military service in Porto Rico and Hawaii was no longer onerous, and the House evidently concurred in this opinion, since the House conference managers for the joint conference that preceded the final passage of the bill, explained the amendment as follows: (38 Cong. Rec., 58th Cong., II, pt. 4, pp. 3906–3907 and pt. 5, pp. 4406–4470):

> Amendment No. 36 cuts off extra pay of troops serving in Hawaii and Porto Rico; and the House recedes.
>
> Amendment No. 37 cuts off additional pay of officers serving in Hawaii and Porto Rico; and the House recedes.

This being so the denial of additional compensation for service in Porto Rico and Hawaii was not only reasonable but also logically inevitable, for the whole theory of the allowance of additional compensation for such service is that such service would be more

onerous than service in the United States. (*Carden* v. *The United States*, 45 C. Cls., 171, 177; *Irwin* v. *The United States*, 38 C. Cls., 87, 98.)

The cases relied on by the Court of Claims and cited in its opinion are not opposed to this conclusion.

*Langston* v. *United States* (118 U. S., 389):

In this case it was held that the bare fact of an inadequate appropriation does not *pro tanto* repeal an earlier general act, but the court was careful to add that the effect of a special act on an earlier general act is exclusively a question of the intention of Congress, express or implied. Furthermore, the doctrine of this case is not to be extended, for as said by this court in the later case of *Belknap* v. *The United States* (150 U. S., 588, 595):

> The Langston case * * * expresses the limit in this respect.

In *Converse* v. *The United States* (26 C. Cls., 6), the appropriation act involved provided as follows:

> Nor shall any part of the money appropriated by this act be used in payment of a per diem compensation to any clerk or marshal for attendance in court, except for days when business is actually transacted in court, and when they attend under sections 583, 584, 671, 672, 2013 of the Revised Statutes, which fact shall be certified in the approval of their accounts. (24 Stat. L., 253.)

Said the court:

> It was, of course, within the power of Congress to change the compensation of clerks and

> marshals, to allow them fees where none had been allowed before, or take away fees which existing statutes gave; but it was equally within their power to place a restriction upon the accounting officers of the Treasury as to a particular appropriation, taking away from them the discretion of paying the per diem in certain cases, and leaving clerks and marshals to their remedy at law, to the end that the right, if it existed, might be judicially determined.
>
> If any doubt could exist as to the effect which should be given to this statute, it would be removed by the subsequent action of the legislative power, for Congress, a year later, when legislating concerning the same fees of the same officers, provided in unequivocal language: * * *

This case, like the Langston case, merely holds that the particular appropriation act involved did not repeal an earlier general act, because the repeal of the earlier act had not been *intended*.

On the other hand, in the subsequent case of *Carden* v. *The United States* (45 C. Cls., 171, 176) the Court of Claims stated expressly that the act of March 2, 1907 (34 Stat. L., 1164), which was a mere repetition of the provisions of the act of June 12, 1906 (34 Stat., 247), relative to extra pay for foreign service, had repealed the earlier similar but more general provisions of the act of June 30, 1902, with respect to Porto Rico and Hawaii.

## CONCLUSION.

It follows that "*service* beyond the limits of the States comprising the Union and the Territories of the United States contiguous thereto shall be as now provided by law" (act of May 11, 1908, 35 Stat. L., 110) did not include service in Porto Rico or Hawaii.

We therefore respectfully submit that the judgment of the lower court should be reversed and the petition dismissed.

HUSTON THOMPSON,
*Assistant Attorney General.*

○

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MAR 5 1918
JAMES D. MAHER
CLERK

# Supreme Court of the United States.

OCTOBER TERM, 1918.

No. 250.

THE UNITED STATES, *Appellant*,

v.

NELSON P. VULTE.

Appeal from the Court of Claims.

## Brief for Appellee.

GEORGE A. KING,
WILLIAM B. KING,
Attorneys for Appellee.

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# Supreme Court of the United States.

**October Term, 1913.**

THE UNITED STATES, *Appellant*,
*v.*
NELSON P. VULTE. } No. 256.

**APPEAL FROM THE COURT OF CLAIMS.**

## *BRIEF FOR APPELLEE.*

### I. STATEMENT OF THE CASE.

This case is clearly stated in the opinion of the Court of Claims, by Judge Booth (record, pp. 3 to 5), 47 C. Cls. 324, 325:

"The plaintiff is a first lieutenant in the Marine Corps. On June 27, 1908, in obedience to proper orders, he sailed from New York, for Porto Rico, remaining on duty there until November 3, 1909, when detached and ordered back to the States. This suit is to recover 10 per cent additional pay for service in Porto Rico, dating said service from the time of departure from the United States until return thereto.

"The plaintiff's pay proper was originally fixed by section 1612, R. S., as follows:

"'The officers of the Marine Corps shall be entitled to receive the same pay and allowances, and the enlisted men shall be entitled to receive the same pay and bounty for reenlisting, as are or may be provided by or in pursuance of law for the officers and enlisted men of like grades in the Infantry of the Army.'

"On June 30, 1902 (32 Stat. L. 512), as part of the appropriation act for the Army, the Congress modified

existing law respecting the pay proper of officers of this grade by the following language:

"'For additional ten per centum increase on pay of commissioned officers serving at foreign stations, $451,-456; *Provided*, That hereafter the pay proper of all commissioned officers and enlisted men serving beyond the limits of the States comprising the Union and the Territories of the United States contiguous thereto shall be increased ten per centum for officers and twenty per centum for enlisted men over and above the rates of pay proper as fixed by law for time of peace, and the time of such service shall be counted from the date of departure from said States to the date of return thereto.'

"Thus far the rights of plaintiff respecting pay are obvious; the complications arise by subsequent legislation.

"Following this statute on June 12, 1906 (34 Stat. L. 247), Congress provided—

"'For additional ten per centum increase on pay of commissioned officers serving beyond the limits of the States comprising the Union and the Territories of the United States contiguous thereto (excepting Porto Rico and Hawaii), as provided by act approved June 30th, 1902, the time of such service to be counted from the date of departure from said States to the date of return thereto.' * * *

"The Army appropriation act of the next session of Congress repeated the above provisions (34 Stat. L. 1164).

"The act of May 11, 1908 (35 Stat. L. 110), provided as follows:

"'That increase of pay for service beyond the limits of the States comprising the Union and the Territories of the United States contiguous thereto shall be as now provided by law.

* * * * * * *

"'For additional ten per centum increase of pay of officers on foreign service, $285,000.

* * * * * * *

"'That nothing herein contained shall be construed so as to reduce the pay or allowances now authorized by law for any officer or enlisted man of the Army; and all

laws or parts of laws inconsistent with the provisions of this act are hereby repealed.' "

The court gave judgment in favor of the claimant for the amount claimed; and the United States appealed (rec. p. 5).

## II. BRIEF OF ARGUMENT.

### Text of Act of 1908.

We give below all provisions of the act of 1908 which will be referred to in this brief (35 Stat. L. 108, 110, 114, 115):

"That hereafter the annual pay of officers of the Army of the several grades herein mentioned shall be as follows:

* * * * * * *

"That increase of pay for service beyond the limits of the States comprising the Union, and the territories of the United States contiguous thereto, shall be as now provided by law.

* * * * * * *

"That nothing herein contained shall be construed so as to reduce the pay or allowances now authorized by law for any officer or enlisted man of the Army; and all laws or parts of laws inconsistent with the provisions of this Act are hereby repealed.

* * * * * * *

"For additional ten per centum increase on pay of officers on foreign service, $285,000.

"For additional twenty per centum increase to enlisted men on foreign service, $767,000; *Provided*, That officers and enlisted men who have served on army transports in the Philippine Archipelago at any time since May 26th, 1900, under the control and orders of the commanding general, Philippines Division, or who may hereafter so serve, shall be entitled to receive the same rate of pay as is provided by law for officers and enlisted men serving at shore stations beyond the limits of the United States.

* * * * * * *

"The specific appropriations hereinbefore made for

officers and enlisted men in the line of the Army and in the several staff corps and departments, enlisted men in the Hospital Corps, officers and enlisted men in the Porto Rico Provisional Regiment of Infantry, and officers in the Philippine Scouts, being based upon former rates of pay, said specific appropriations are hereby increased to the amounts necessary for payment of such increase of pay at the rates established in this Act."

## The Question Stated.

The decision of the Comptroller of the Treasury, referred to by the court towards the close of its opinion (rec. p. 5) is so pertinent and applicable to the question in this case that it is annexed to this brief as an Appendix (*post*, pp. 32–35).

This decision held that the appropriation of April 23, 1904 (33 Stat. L. 266), amounted only to "a failure to appropriate sufficient money to pay the increased pay for the fiscal year 1905, so far as the Army is concerned."

As the appropriations for the Marine Corps were made simply in general terms for "pay and allowances prescribed by law," etc., he held that there was not even a failure to appropriate, and that those serving in the Marine Corps were entitled to receive ten per cent increase pay, while serving in Porto Rico and Hawaii, out of the current appropriation made by the act of 1904 for the year ending June 30, 1905.

The decision of the Comptroller is submitted to be correct and to be as applicable to the question now before the court as to the one which was directly before the Comptroller. It was accepted by Congress as the basis for appropriation, as shown in the brief of the Assistant Attorney-General (p. 8).

This claim rests upon the act of 1902 as reenacted and continued by that of 1908 (*ante*, pp. 1–3). These

are Army statutes applying to the Marine Corps by Rev. Stat. Sec. 1612.

Neither act excepts service in Porto Rico from the general grant of the increase. Nor is it excepted in any other legislation of 1908 or 1909.

The case of the United States must rest upon the following propositions:

1. That the clause in parenthesis in the army appropriation acts of 1906 and 1907 (34 Stat. L. 247, 1164, quoted *ante*, p. 2) — "(excepting Porto Rico and Hawaii)"—constituted a suspension or temporary repeal for those particular fiscal years of so much of the act of 1902 as allowed increase of pay for service in those two places.

2. That this suspension or temporary repeal was made permanent by the act of 1908 (*ante*, p. 2) providing that increase of pay for service beyonds the limits of the States and Territories "shall be as now provided by law."

3. That the exceptions thus parenthetically made to the army appropriation acts of 1906 and 1907 are to be brought forward by construction to limit the effect of the appropriations for the Marine Corps in 1908 and 1909.

The appellee, on the other hand, submits the following propositions:

1. That the clause of 1906 and 1907 in parenthesis—"(excepting Porto Rico and Hawaii)"—constituted a limitation or restriction upon the expenditure of the money appropriated by those acts for particular fiscal years and was not a repeal, temporary or permanent.

2. That, whether this be so or not, the act of 1908, declaring that increase of pay for service beyond the limits of the States and Territories "shall be as now pro-

vided by law," meant, as provided by the existing permanent provision of the act of 1902.

3. That, whatever be the purport of the army appropriations, there is no exception to the application of the appropriations for the Marine Corps as regards either Porto Rico or Hawaii.

Let us examine in succession the purport of the legislation, first of 1906 and 1907, and then of 1908.

## Acts of 1906 and 1907.

The act of 1906 (*ante*, p. 2) is a mere appropriation. The literal construction of its terms is, that Congress was limiting the expenditure of the particular sum appropriated in the clause. If the terms of the act can be satisfied by this construction this is conclusive in its favor. A literal construction must always be adopted where it involves no absurdity or contradiction (*Dewey* v. *United States*, 178 U. S. 510, 521).

A repeal *pro tanto* of the act of 1902 can not be inferred by indirection merely from language of appropriation. Repeals by implication are never favored; and one statute will not be construed so as to repeal another if by any reasonable construction the two may stand together. In *United States* v. *Langston*, 118 U. S. 389, a permanent provision of law fixed the salary of the Minister to Hayti at $7,500, but by the appropriation acts covering the period in question, only $5,000 was appropriated for each year for the payment of the salary. The court said in the opinion by Mr. Justice Harlan (118 U. S. 393, 394):

"The salary of the Minister to Hayti was originally fixed at the sum of $7,500. Neither of the acts appropriating $5,000 for his benefit, during the fiscal years in question, contains any language to the effect that such sum shall be 'in full compensation' for those years, nor

was there in either of them an appropriation of money 'for additional pay,' from which it might be inferred that Congress intended to repeal the act fixing his annual salary at $7,500. Repeals by implication are not favored. It can not be said that there is a positive repugnancy between the old and the new statutes in question. If by any reasonable construction they can be made to stand together, our duty is to give effect to the provisions of each. *Chew Heong* v. *United States*, 112 U. S. 536, 549; *State* v. *Stoll*, 17 Wall. 425, 430; *Ex parte Yerger*, 8 Wall. 85, 105; *Ex parte Crow Dog*, 109 U. S. 556, 570. The suggestion of most weight in support of the view that Congress intended to reduce the salary of the diplomatic representative at Hayti, is the improbability that that body would neglect, in any year, to appropriate the full sum to which that officer was entitled under the law as it then existed. On the other hand, it is not probable that Congress, knowing, as we must presume it did, that that officer had in virtue of a statute—whose object was to fix his salary—received annually a salary of $7,500 from the date of the creation of his office, and after expressly declaring in the act of 1878, 20 Stat. 91, 98, that he should receive that salary from and after July 1, 1878, and again, in 1879, that he should receive the same amount from and after July 1, 1879, should, at a subsequent date, make a permanent reduction of his salary without indicating its purpose to do so, either by express words of repeal, or by such provisions as would compel the courts to say that harmony between the old and the new statute was impossible. While the case is not free from difficulty, the court is of opinion that, according to the settled rules of interpretation, a statute fixing the annual salary of a public officer at a named sum, without limitation as to time, should not be deemed abrogated or suspended by subsequent enactments which merely appropriated a less amount for the services of that officer for particular fiscal years, and which contained no words that expressly or by clear implication modified or repealed the previous law."

The general principles here stated are applicable to the

present case, for the defense here is a demand to construe the latter statute as a repeal by implication of the earlier, although the two statutes may, by a reasonable construction, be made to stand together. The *Langston* case and this case are immediately analogous, for in each a repugnance is asserted between a permanent grant and a narrower appropriation to meet the grant.

This view is enforced by the classic statement of Justice Story in *Minis* v. *United States*, 15 Pet. 423, 445:

"It would be somewhat unusual to find engrafted upon an act making special and temporary appropriations any provision which was to have a general and permanent application to all future appropriations. Nor ought such an intention on the part of the legislature to be presumed unless it is expressed in the most clear and positive terms, and where the language admits of no other reasonable interpretation."

An annual appropriation bill must pass; this necessity affords the most favorable opportunity for hasty legislation to be engrafted upon it. The rule laid down in the last quoted sentence, sanctioned by long continued authority, effectively guards against this by refusing to recognize such enactments as intended to be of wider scope than they are clearly expressed to be. Such is the claimant's contention here.

The Court of Claims has had occasion to discuss the existence of a liability independent of an appropriation. In *Collins* v. *United States*, 15 C. Cls. 32, 35, 36, Judge (afterwards Chief Justice) Richardson, explains the nature of an appropriation act as passed in pursuance of the provision of the Constitution that "no money shall be drawn from the Treasury but in consequence of appropriations made by law." (Constitution, Art. I, Sec. 9, Clause 7.) He says:

"The compensation to which public officers are legally

entitled depends upon general and continuing laws fixing their salaries. The officers of the Treasury have no authority to pay such compensation until appropriations therefor are made; and these are made by Congress annually, except in the case of the judges of the Supreme Court, for whose salaries there is a permanent annual appropriation (Rev. Stat. Sec. 3689, 2d ed. p. 729). The liability however, exists independently of the appropriation, and may be enforced by proceedings in this court. In *Graham's case* (1 C. Cls. R. 381), where Congress appropriated a sum less than the amount of the salary established by law for the office which the claimant held, it was determined that he was entitled to the full amount of the established salary, and he recovered judgment therefor."

This principle in regard to the character and function of an appropriation act is illustrated by two decisions of the Court of Claims, neither of which was appealed to this court. In the first of these, *Converse* v. *United States*, 26 C. Cls. 6, 8, 9, the court considered and thus construed the following statute:

"'Nor shall any part of the money appropriated by this act be used in payment of a per diem compensation to any clerk or marshal for attendance in court, except for days when business is actually transacted in court, and when they attend under sections 583, 584, 671, 672, 2013 of the Revised Statutes, which fact shall be certified in the approval of their accounts.' (24 Stat. L. p. 253.)

"It was, of course, within the power of Congress to change the compensation of clerks and marshals, to allow them fees where none had been allowed before, or take away fees which existing statutes gave; but it was equally within their power to place a restriction upon the accounting officers of the Treasury as to a particular appropriation, taking away from them the discretion of paying the per diem in certain cases, and leaving clerks and marshals to their remedy at law, to the end that the right, if it existed, might be judicially determined.

"If any doubt could exist as to the effect which should

be given to this statute, it would be removed by the subsequent action of the legislative power, for Congress, a year later, when legislating concerning the same fees of the same officers, provided in unequivocal language:"

Here follows a repealing statute just as Congress in 1912 repealed the provision for increase in Hawaii and Porto Rico (*post*, p. 14).

Again, and more elaborately, in *Geddes* v. *United States*, 38 C. Cls. 428, the question was as to the effect of the following statutory provision (p. 443):

"That no part of the money herein or hereafter appropriated for the Department of Agriculture shall be paid to any person, as additional salary or compensation, receiving at the same time other compensation as an officer or employee of the Government."

The court thus construed this provision (pp. 444, 445):

"That statutory provision is a proviso to an appropriation, and its plain purpose is that no person in the Department of Agriculture, or out of the Department of Agriculture, who is receiving 'compensation as an officer or employee of the Government shall be paid additional compensation for additional service out of general funds appropriated for the Department of Agriculture.' Applying to no designated class of persons, it is a provision of law controlling appropriations for the Department by limiting the discretionary authority of the Secretary. The evil against which it is directed is the practice of allowing additional compensation for additional service in that Department.

"That limitation upon the power of the Secretary does not constitute a defense. An appropriation is the setting aside by Congress of a designated amount of public money for a designated purpose.

"'No money shall be drawn from the Treasury but in consequence of appropriations made by law.' (Const. Art. I, sec. 9.)

"The accounting officers are the guardians of the

appropriations. It is their business to see that no money is paid out of the Treasury unless the payment is authorized by an appropriation act. It is not their business to adjudicate abstract questions of legal right beyond the legal right of a person to be paid out of a specific appropriation. An appropriation constitutes the means for discharging the legal debts of the Government.

"The judgment of a court has nothing to do with the means—with the remedy for satisfying a judgment. It is the business of courts to render judgments, leaving to Congress and the executive officers the duty of satisfying them. Neither is a public officer's right to his legal salary dependent upon an appropriation to pay it. Whether it is to be paid out one appropriation or out of another; whether Congress appropriate an insufficient amount, or a sufficient amount, or nothing at all, are questions which are vital for the accounting officers, but which do not enter into the consideration of a case in the courts. This has been repeatedly held by the Supreme Court and this court, beginning with *Graham's Case*, in the first volume of the Reports. (1 C. Cls. R. 380.) The appropriations made for all the Executive Departments, except that of the Department of Agriculture, are specific—so much for this object, so much for that. But it has been the legislative practice for some years to appropriate gross amounts for the Department of Agriculture, and at the same time to append the above limitation upon the power of the Secretary. The judgment of this court will not be paid out of that appropriation; the limitation upon the power of the Secretary does not extend to the court; the real question before the court is that of the claimant's legal right to receive the pay of both offices, irrespective of the statutes above quoted. All these questions were considered in *Collins' Case* (15 C. Cls. R. 22), and are there exhaustively treated."

The opinion in each of these cases is by Chief Justice Nott of that court. The rule is thus well established, that a restriction upon the expenditure of a particular appropriation will not be extended into a change of substantive law.

This court, in a case decided at the present term, refused to interpret a proviso to an appropriating clause as of wider import than the subject-matter of the appropriation. (*Pennington* v. *United States*, 231 U. S. 631.)

The present case is an attempt on the part of the United States to give to an appropriating clause relating to one fiscal year, a far-reaching and permanent construction, setting aside an existing clearly expressed statute.

## Rules as to Appropriation Bills.

These views receive added force at the present day by consideration of the restrictions thrown by statute, as well as by rules of Congress, around the enactment of appropriation bills. These are designed to confine them to their legitimate function of providing money to carry on the Government in accordance with existing permanent legislation, and to prevent them from being used to enact new and substantive legislation.

The act of June 22, 1906, provides:

"Sec. 4. Hereafter the estimates for expenses of the Government, except those for sundry civil expenses, shall be prepared and submitted each year according to the order and arrangement of the appropriation acts for the year preceding. And any changes in such order and arrangement, and transfers of salaries from one office or bureau to another office or bureau, or the consolidation of offices or bureaus desired by the head of any Executive Department may be submitted by note in the estimates. The committees of Congress in reporting general appropriation bills shall, as far as may be practicable, follow the general order and arrangement of the respective appropriation acts for the year preceding." (34 Stat. L. 448.)

When all the appropriation acts now involved were

passed, the following was a rule of the House of Representatives:

"* * * nor shall any provision changing existing law be in order in any general appropriation bill or in any amendment thereto.—Rule XXI, Clause 2." (Digest and Manual, Rules and Practice, House of Representatives, 54th Cong. p. 279.)

The rule of the Senate has always been and still is to the same effect. Rule XVI, Clause 3, provides as follows:

"No amendment which proposes general legislation shall be received to any general appropriation bill, nor shall any amendment not germane or relevant to the subject-matter contained in the bill be received;" etc. (Senate Manual, 54th Cong. p. 16.)

Notwithstanding the rule, it was always held that "the House may by limitation on a general appropriation bill provide that no part of an appropriation shall be used for a certain purpose." (Hinds' Precedents of the House of Representatives, Vol. 4, Chapter XCVIII, Limitations in General Appropriation Bills, Paragraph 3917, p. 617.)

The rule of interpretation laid down by Justice Story in *Minis* v. *United States*, 15 Pet. 423, quoted, *ante*, p. 8, that an attempt to engraft general legislation on appropriation bills is not to be presumed except "where the language admits of no other reasonable interpretation" is in strict accordance with the practice of Congress as expressed in legislative rules. So too is the discrimination of the Court of Claims in the cases cited, *ante*, pp. 9–11, between a limitation on an appropriation and a change of law.

An incidental parenthetical clause, such as the words "(excepting Porto Rico and Hawaii)", is therefore not general legislation, changing existing law even for the year to which the appropriation act applies, but is a mere

"limitation of expenditure" under this appropriation. Much less can it be held to make a permanent change of law.

It was in order as such a limitation only, and after so gaining a position upon the bill, is not to be construed as a change of existing law unless it "admits of no other reasonable interpretation."

In the 62d Congress, beginning March 4, 1911, Clause 2 of Rule XXI was amended to read as follows:

"2. No appropriation shall be reported in any general appropriation bill, or be in order as an amendment thereto, for any expenditure not previously authorized by law, unless in continuation of appropriations for such public works and objects as are already in progress. Nor shall any provision in any such bill or amendment thereto changing existing law be in order, except such as being germane to the subject-matter of the bill shall retrench expenditures by the reduction of the number and salary of the officers of the United States, by the reduction of the compensation of any person paid out of the Treasury of the United States, or by the reduction of amounts of money covered by the bill."

This permits new and general legislation on appropriation bills, if it retrenches expenditures. In accordance with the new rule, Congress enacted in the Army appropriation act, approved August 24, 1912:

"That hereafter the laws allowing increase of pay to officers and enlisted men for foreign service shall not apply to service in the Canal Zone, Panama, or Hawaii, or Porto Rico." (37 Stat. L. 576.)

This is plainly general legislation. Immediately upon its enactment and not before, the right to receive the ten per cent increase for service in the places named came to an end.

Consideration of the special function of an appropriation

act will emphasize the presumption against repeal by implication in such act.

An annual appropriation act is a necessity to the Government. An attempt is sometimes made by one House of Congress to use this necessity to force the passage of general legislation not wanted by one or more of the three separate branches of the legislative power.

We may suppose a case where one House desires to reduce the scope of an existing law and the other desires to make an appropriation to carry it out fully. One House may properly assert that it can not be coerced into lessening the scope; the other that it can not be compelled to make an unlimited appropriation. The result would be the triumph of both negatives in the passage of a limited appropriation. It would take the form of the appropriation now under consideration in the words "(excepting Porto Rico and Hawaii)."

Thus it is seen that the presumption against the general character of legislation on appropriation bills declared in *Minis* v. *United States*, *ante*, p. 8, rests in its last analysis upon the constitutional relations of the Houses of Congress.

The objections to such legislation were forcibly illustrated in connection with the army appropriation act of 1912, from which a quotation has been already made, *ante*, p. 14. The President vetoed the bill when it first came before him partly on the ground that—

"In addition to the appropriation bill proper there were enacted by the House of Representatives, in six appended sections and elsewhere in the bill, a body of legislation which would substantially reorganize and change the existing military establishment. Among other things, this legislation * * * altered the amounts of pay and conditions of allowances made to officers and enlisted men"; etc. (House Document No. 835, 62d Cong. 2d Sess.)

He thus forcibly stated the true theory of legislation on appropriation bills:

"This brief summary of the history and character of the affirmative legislation attached to this bill serves to bring out the objections thereto. The dangers inherent in the practice of attaching substantive legislation to appropriation bills have been frequently pointed out by my predecessors. The only justification that has been offered for such practice is that it has been found a convenient method for facilitating the passage of measures which are deemed expedient by all the branches of government which participate in legislation. Thus, it has more than once occurred that useful items of Army legislation, generally of an urgent character, have been passed in this manner, when the desirability of the enactment was recognized and acquiesced in by the common consent of both the Executive and of Congress."

In the present instance, the words "(excepting Porto Rico and Hawaii)" literally mean nothing more than an exception from the accompanying appropriation. There is nothing in the language used to show that "the desirability of the enactment" of a change in the substantive law "was recognized and acquiesced in by the common consent of both the Executive and of Congress." But the rule already quoted, *ante*, p. 8, is, that such an intent "must be expressed in the most clear and positive terms."

To hold that the words under discussion are a repeal of the grant of 1902, is to hold that the failure of all three branches of the legislative power to concur in appropriating fully to carry out an existing statute constitutes a repeal *pro tanto* of the statute.

Reference is made in the brief for the United States (pp. 8–10), to conference reports and even to debates. These references are of doubtful admissibility as aids in the construction of the statute (*United States* v. *Freight*

*Association*, 166 U. S. 290, 318, 319). They fail to touch the question involved in this case. The utmost that any one of them show is either an omission or exception of Porto Rican and Hawaiian service from the appropriations made by the acts covering service in a particular fiscal year.

The provisions here involved got into the bill in the guise of restrictions upon the expenditure of particular appropriations. Having obtained a standing in the bill by virtue of their ostensible character as limitations upon appropriations, they are now claimed to be not mere restrictions upon appropriations or even mere temporary repeals, but to operate as repealing for all time the permanent and general provision of the act of 1902. A provision should not be permitted to masquerade through Congress in one character, only to assume a totally different phase after being enacted into law.

As said by Chief Justice Nott in *Wisconsin Central R. R.* v. *United States*, 27 C. Cls. 440, 467, 468 (affirmed, 164 U. S. 190), "It is most undesirable that a public measure shall mean one thing when it is a bill before Congress, and another when it is a statute before the judiciary. Canons of construction which may lead to this result are to be shunned."

*Carden* v. *United States*, 45 C. Cls. 171, 176, cited in the brief for the United States (foot p. 12), was the claim of a Revenue Cutter officer for ten per cent increase while traveling in Europe. It has nothing to do with Porto Rican service and is entirely without application to the question involved in the present case.

## Act of 1908.

All the services for which the increase is here claimed were rendered after the passage of the act of May 11, 1908, increasing the pay of the Army and consequently

of the Marine Corps, *ante*, pp. 3, 4. The question in this case is therefore not so much the construction of the acts of 1906 and 1907 as that of 1908.

The clause of the act of May 11, 1908, appropriating "for additional ten per centum increase on pay of officers on foreign service," *ante*, p. 3, makes no exception of Porto Rico, Hawaii, or any other particular place. Nor do those of 1909 (35 Stat. L. 739), 1910, and 1911 (36 Stat. L. 250, 1043). The exceptions in the appropriation acts of 1906 and 1907, *ante*, p. 2, were at most temporary and applicable only to those years. It follows that, if this appropriating clause were the only passage on the subject in the act of 1908, there could be no question of the right of any officer of either the Army or Marine Corps, serving in Porto Rico or Hawaii, to receive a ten per cent increase on his pay for the year thereby appropriated for and likewise in later years.

Service in Porto Rico and Hawaii is claimed by the United States to be excepted through the operation of that provision of the act of 1908, which says, *ante*, p. 3:

> "That increase of pay for service beyond the limits of the States comprising the Union and the Territories of the United States contiguous thereto, shall be as now provided by law."

The obvious and natural meaning of the several clauses of this sentence may be defined as follows: "That increase of pay for service," that is, for all service, "beyond the limits of the States comprising the Union and the Territories of the United States contiguous thereto," that is, everywhere beyond such limits, "shall be as," that is, at the rate and computed in the manner, "now provided by law," that is, granted by existing substantive enactment.

There is nothing which suggests any purpose to refer

back to anything but a pre-existing permanent and general enactment.

It is followed shortly afterward by a provision, *ante*, p. 3, "That nothing herein contained shall be construed so as to reduce the pay or allowances now authorized by law for any officer or enlisted man of the Army."

The Government's contention may be reduced to the following: (*a*) If the act of 1908 contained nothing more than the appropriation in the same language as used, "for additional ten per centum increase on pay of officers on foreign service," the increase would be due for Porto Rican and Hawaiian service, because provided by existing law. (*b*) But the act of 1908 also contains a provision, that increase for service beyond the States and contiguous Territories shall be "as now provided by law," and another provision forbidding any reduction of pay, both being clearly intended to protect, and not to destroy, existing rights. (*c*) The Government claims that the latter provisions take away what would have been the claimant's rights under a simple appropriation.

Such a construction defeats itself. No member of either House of Congress who voted for this act of 1908 could possibly have guessed from the language that he was voting for anything but a comprehensive increase of pay for all service beyond the limits of the States and Territories of the Union.

As this court has said in *Dewey* v. *United States*, 178 U. S. 510, 521:

"Here, the language used by Congress is unambiguous. It is so clear that the mind at once recognizes the intent of Congress. Interpreted according to the natural import of the words used, the statute involves no absurdity or contradiction, and there is consequently no room for construction. Our duty is to give effect to the will of Congress, as thus plainly expressed."

It is only by attempting to read between the lines for some hidden purpose of Congress that any exception of particular places from the generality of this legislation can be inferred.

An official publication of the War Department issued in 1911 shows that that Department did not at that date recognize the existence of any exceptions to the general provisions for increase of pay for service beyond the limits of the States and contiguous Territories.

"The Military Laws of the United States, Fourth Edition, 1901," contains, on page 317, under the head of "Increased Pay for Foreign Service," as paragraph 816, the text of the act of March 2, 1901, which is substantially identical with that of 1902. (See the text of both, *post*, pp. 33, 34.) In 1911 there was published a "Supplement to the Fourth Edition of the Military Laws of the United States Showing Changes to August 22, 1911," etc., "Prepared under the Direction of Brigadier General Enoch H. Crowder, Judge Advocate General, United States Army, by Lieutenant Colonel John Biddle Porter, Judge Advocate, United States Army." This supplement contains, at page 1219, the following:

"INCREASE PAY FOR FOREIGN SERVICE.

"816a. Increase of pay for service beyond the limits of the States comprising the Union, and the territories of the United States contiguous thereto, shall be as now provided by law. Act of May 11, 1908 (35 Stats. 110.) (This paragraph merely reaffirms paragraph 816.)"

The note in parenthesis is conclusive that the provision of the act of 1908 merely reaffirms the old statutory provisions of 1901 and 1902, without any exceptions against Hawaii or Porto Rico. No such exceptions are treated

in the paragraph here quoted, or anywhere else in this supplement as existing law in 1911. This is an authoritative official construction of the law, which is entitled to great weight.

Unofficial construction in publications edited with great care and in very general use throughout the country, is to the same effect.

The provisions of the acts of 1902, *ante*, pp. 1, 2, granting the foreign service increase, and 1908, *ante*, p. 3, continuing the increase "as now provided by law," are the only statutes on this subject contained in the Compiled Statutes, Title XIV, The Army, Chapter 3, Pay and Allowances, Supplement, 1911, pp. 339–341. The intervening legislation of 1906 and 1907 is omitted as relating only to temporary appropriation. While this is an unofficial publication, the omission is significant as indicating the natural construction as it appears to an expert and impartial editor of laws.

The same is true of the Federal Statutes Annotated, in which, Vol. 7, p. 1038, the act of March 2, 1901, for increase of pay for foreign service, appears with a notation of its amendment of 1902, and in the Supplement, 1912, the provision of the act of 1908 for increase of pay "as now provided by law" appears at p. 699, without the slightest reference to any intervening legislation.

A circumstance not to be overlooked is one mentioned by the Court of Claims in its opinion,—the "substantial increase in each succeeding appropriation bill to meet the additional pay for services of this character" (record, p. 5).

The appropriation of 1907 for the 20 per cent increase to enlisted men was $575,000 and for the 10 per cent increase to officers $210,000 (34 Stat. L. 1164). In 1908, the appropriation for increase to enlisted men was

$767,000, and to officers $285,000 (35 Stat. L. 114) and these sums were "based upon former rates of pay," and were "hereby increased to the amounts necessary for payment of such increase of pay at the rates established in this Act" (35 Stat. L. 115; *ante*, pp. 3, 4).

Thus Congress carried out the purpose of liberality to the Army by granting all that previous general legislation had allowed and more; without re-enacting any of the temporary restrictions upon expenditure found in some of the former appropriation acts.

## A Legislative Construction.

The question what was the increase of pay for service beyond the limits of the States, etc., "now provided by law," has received legislative construction. The act of 1908 (*ante*, p. 3) says that this increase "shall be as now provided by law." As we have seen, the question for solution is whether this expression refers to the general and permanent law contained in the act of 1902 (*ante*, pp. 1, 2) or to the temporary excepting clause contained in the acts of 1906 and 1907 (*ante*, p. 2).

Now, Congress in this very act of 1908 defined the service for which "increase of pay" is "now provided by law."

This proviso (35 Stat. L. 114; *ante*, p. 3) directs "That officers and enlisted men who have served on Army transports in the Philippine Archipelago at any time since May 26th, 1900, under the control and orders of the commanding general, Philippines Division, or who may hereafter so serve, shall be entitled to receive the same rate of pay as is provided by law for officers and enlisted men serving at shore stations beyond the limits of the United States."

Thus we have in the same act of 1908 a definition that the increase of pay "provided by law" is "for officers

and enlisted men serving at shore stations beyond the limits of the United States." This is a contemporaneous legislative construction made by the same act *in pari materia*.

It has been seen, *ante*, p. 14, that on August 24, 1912, Congress enacted: "That hereafter the laws allowing increase of pay to officers and enlisted men for foreign service shall not apply to service in the Canal Zone, Panama, or Hawaii or Porto Rico." Its abolition "hereafter" presupposes its existence "heretofore" in the opinion of Congress. If the act of a later Congress can ever influence the construction of an earlier act, this act must be held to recognize the continued force of the acts of 1902 and 1908.

## Opinions of Attorney-General.

The Attorney-General is frequently called upon to construe legislation of this character. The general presumption against repeal is forcibly stated by Attorney-General Cushing in his opinion on *General Scott's* case (7 Opin. 399, 431, 432):

"It is in the power of the lawgiver to repeal at will, by express terms, any existing statute.

"When he abstains from doing this, and contents himself with subjoining new provisions as new exigencies arise—sometimes adding to, sometimes taking away from, what exists—and the administrator of the law is called upon to determine a suggestion of implied repeal, that determination is aided if not guided by rules of established legal or logical presumption.

"In the absence of expressed will of the legislator to repeal a particular provision of existing law, there is presumed a purpose of coherence and compatibility of enactment, so that all the provisions, new and old, may stand together—rather than a purpose of undefined but irreconcilable repugnancy, in contradiction with methodical unity of thought.

"In such absence of any expressed will to repeal, the mind of the juridical expositor follows the general rule of presuming in favor of that which is, and against a dissolution of continuance.

"Finally, as a corollary from the last principle, a provision of law once existing by legislative enactment, the affirmation in argument is with him who pretends repeal; on him is the burden of proof, and he must establish his proposition to the satisfaction of the determining judgment.

"'Whoever,' say the authorities of the civil law, in unison with those of the common law, 'alleges the abrogation of a law once promulgated and received, from him, when that is material, the proof is to be exacted. For, since laws are enacted with intent that they shall endure, and in order that they be observed by the people, it follows that, until the contrary be proved, all presumptions militate for their obligation and duration of use.' (J. Voet, ad Pandect, lib. 1, tit. 3, art. 40.)

"These are the rules on the subject, which, being the well settled result of long experience, have passed into axioms of universal jurisprudence. They govern the reason with decisive authority in the investigation of a subject like this, requiring exact and critical discrimination of the most delicate implications of law."

In 27 Opin. 108, the question was whether certain provisions empowering the Postmaster-General to impose fines upon railroads for delays in their mail service, which, like those here involved, appeared in the appropriation acts for 1906 and 1907, but were omitted from that of 1908, were to be regarded as thereafter in force. The Attorney-General said (pp. 109–111):

"The question thus presented is, what effect, if any, shall be given to the omission of Congress to incorporate in the appropriation bill for the current year a clause similar to those above set forth? Or, to put it otherwise, are the provisions with respect to the fining of railroads for delays in carrying the mails, which were made a part of the appropriation acts for the fiscal years ending June

30, 1907, and June 30, 1908, to be regarded as permanent or as temporary legislation?

"In my judgment, these clauses in the appropriation bills are meant to be and are the law for the appropriation period, and for that only. This conclusion is reached by a study of several considerations.

"*First.* Congress itself has given a legislative construction to the words used. The language employed in the first of these appropriation acts is 'that the Postmaster-General shall require all railroads carrying the mails under contract to comply with the terms of said contract,' while in the second it is declared 'that the Postmaster-General shall require all railroads carrying the mails to maintain their regular train schedules'; the remaining words in both clauses being identical. Now, so far as the prompt arrival and departure of mails is concerned, there is no difference between requiring the railroads to keep their contracts and requiring them to maintain their regular train schedules. What the railroads contract to do is to carry the mails in accordance with the schedules fixed by them. These two provisions being thus designed to accomplish the same purpose, it follows that Congress would not have incorporated such a clause in the second appropriation bill referred to if it had thought that a similar clause in the first appropriation bill was permanent legislation. So, further, the omission of any provision on the subject in the last appropriation act indicates a conscious purpose thereafter to abandon the requirement altogether. In this connection it may be added that, while the intent of a legislative body can not be ascertained by a resort to debates or discussions, either on the floor or in committee, the view here expressed is in harmony with that entertained by members of the House Committee on Post-Offices and Post Roads at the last session of Congress, as indicated in the hearings which preceded the formulation of the appropriation bill for the present fiscal year.

"*Second.* An examination of numerous authorities on the subject confirms the opinion that no clause, phrase, or section of an appropriation act ought to be construed as permanent legislation unless such words are used

therein as make the purpose clear. Mr. Justice Story in *Minis* v. *United States* (15 Pet. 423, 445), states the rules as follows:

"'It would be somewhat unusual to find engrafted upon an act making special and temporary appropriation any provision which was to have a general and permanent application to all future appropriations. Nor ought such an intention on the part of the legislature to be presumed, unless it is expressed in the most clear and positive terms, and where the language admits of no other reasonable interpretation.'

"In the case of *United States* v. *Jarvis* (2 Ware's Reports), the court in construing a general regulation incorporated in an appropriation act says at page 278:

"'The act itself is one of those annual acts which spend their power in the course of the year, to which we are not accustomed to look for permanent regulations. If the legislature annex to such an act any special provision which has a proper application to the subject-matter of the act, and use no words indicating an intention to give it a more extensive operation, the just conclusion would seem to be that the special regulation was intended to be confined to the matters embraced by the act.'

"In Lewis's Sutherland on Statutory Construction (vol. 2, 2d ed., p. 663), many authorities are cited to sustain the general proposition that when the subject-matter of a statute is once clearly ascertained, all portions of it, even when couched in broader terms, will be restrained within the scope and purpose of the act itself, unless the legislative intent to give a broader effect is unmistakably revealed. As an instance of the application of this rule the author says:

"'Thus in the construction of a temporary appropriation act the presumption is that any special provisions of a general character therein contained are intended to be restricted in their operation to the subject-matter of the act, and not permanent regulations, unless the intention of making them so is clearly expressed.'"

In a later opinion, the Attorney-General considered

whether a provision repeated in a number of successive appropriation acts, but omitted from later ones, remained in force.

The following remarks (27 Opin. 294, 295) are directly applicable to the provisions here under consideration:

"This legislative history seems to show that the proviso under consideration was not viewed by Congress as establishing a permanent rule, but rather as being a special and temporary regulation concerning the particular bulletins for which at the very time of enacting the proviso appropriation was being made. Otherwise the repetition and reenactment of the proviso in each of seven successive years were strange and superfluous. Further, in consequence of the repeated previous treatment of the proviso by Congress as depending upon annual repetition and reenactment for its continued operation, the elimination of the proviso when the appropriation for Farmers' Bulletins was first made, in 1907, in the sundry civil appropriation act seems to show that it was then the intention of Congress to have the rule of the proviso no longer operative.

"While general and permanent enactments now not infrequently appear in appropriation acts, the presumption concerning a provision in such an act is rather against permanence. In the opinion of the Supreme Court in the case of *Minis* v. *United States* (15 Pet. 423), Mr. Justice Story said (p. 445):

"'It would be somewhat unusual to find engrafted upon an act making special and temporary appropriations, any provision which was to have a general and permanent application to all future appropriations. Nor ought such an intention on the part of the legislature to be presumed, unless it is expressed in the most clear and positive terms, and where the language admits of no other reasonable interpretation. * * * * A general rule, applicable to all future cases, would most naturally be expected to find its proper place in some distinct and independent enactment.'

"Some suggestion of a permanent rule is found in the

declaration of the proviso that Farmers' Bulletins not seasonably called for by Members of Congress 'in each fiscal year' shall revert to the Secretary of Agriculture; but this verbal consideration hardly seems potent against the legislative history which has been detailed. The large feature of the matter is that Congress treated the rule as calling for annual reenactment if it were to be continued, and also seems to have sought its discontinuance by eliminating it from the sections making appropriations for Farmers' Bulletins in and after 1907."

In the enactments now under consideration for two fiscal years certain places were enumerated; for the two following fiscal years certain places were excepted; then Congress appropriated without either enumeration or exception. These authorities warrant the conclusion that its intention is to make the new appropriation as broad as the language imports and not to limit it by either the enumeration or the exceptions made in past years.

## Analogy of Naval Statutes.

Any possible doubt of the intention of Congress is removed by a comparison of the statute of May 11, 1908, increasing the pay of the Army with the contemporaneous statute of May 13, 1908, increasing the pay of the Navy (35 Stat. L. 108–110, 127, 128).

The Navy act says (35 Stat. L. 128):

"All officers on sea duty and all officers on shore duty beyond the continental limits of the United States shall while so serving receive ten per centum additional of their salaries and increase as above provided, and such increase shall commence from the date of reporting for duty on board ship or the date of sailing from the United States for shore duty beyond the seas or to join a ship in foreign waters."

This provision, couched in language appropriate to the Navy, is precisely co-extensive with the provision for

increase to officers of the Army in the act of 1902 (*ante*, pp. 1, 2). All officers of the Navy have ever since its enactment received ten per cent increase for all service beyond the continental limits of the United States without exception (16 Comp. Dec. 19, 20).

In the recent case of *Plummer* v. *United States*, 224 U. S. 137, this court considered a ten per cent increase of another kind granted by this Navy pay statute of 1908, that is, for length of service. It was insisted on behalf of that officer that the statute on its face gave the right to have the longevity increase computed not only upon the grade pay, but also upon previous increases. This view was rejected by the court, in an opinion by the Chief Justice, mainly because the intention of Congress in the passage of the two acts of 1908 was to equalize the pay of the two services, and as the Army statute gave the increase only upon the grade pay, it was to be presumed that Congress did not desire a more liberal rule to be applied to the Navy. The language is (p. 144):

"In view of the purpose of Congress to equalize as far as possible the pay of Army and Navy officers, manifested by the adoption of the Navy Personnel Act of 1899 and in all subsequent legislation as to such pay," etc.

The same reason applies to the present case. Congress by the Navy pay act gives a ten per cent increase for all services rendered outside the continental limits of the United States without exception. The purpose of Congress to equalize the pay of Army and Navy officers can be carried out only by giving to the Army pay statute, a construction equally broad, especially when no exception to the generality of its terms is apparent on its face.

To put the matter in concrete form: Suppose an officer of the Navy of corresponding rank and length of service had been serving side by side with the claimant in this

case in Porto Rico. If that naval officer asked for a computation of his longevity pay by giving him increase upon increase, instead of simply upon the grade pay, he would be answered by this court that he was not entitled to it for the reason that Congress intended to equalize his compensation with that of the Army and Marine Corps, and that the literal terms of the navy act must be construed in the light of this general legislative purpose.

This case presents the converse of the question. This Marine officer is before this court asking for a ten per cent increase on account of his service in Porto Rico. Surely he may point with conclusive effect, in the light of the decision of this court in the *Plummer* case, to the fact that an officer of the Navy of equal rank and length of service with himself, when serving side by side with him in Porto Rico, would be drawing this ten per cent increase without question. Thus only would this officer and a naval officer of corresponding rank and length of service, serving together in Porto Rico, draw the same pay.

## Conclusion.

To sum up our contentions:

1. The acts of 1906 and 1907 except officers serving in Porto Rico and Hawaii only from the benefit of the particular appropriations made by those acts, but do not even for those years deprive such officers of the benefit of the act of 1902, allowing increase of pay for all service beyond the States and contiguous Territories.

2. The act of 1908 provides: "That increase of pay for service beyond the limits of the States comprising the Union, and the Territories of the United States contiguous thereto, shall be as now provided by law." This refers to the permanent act of 1902 and not to any temporary exceptions made for particular fiscal years.

3. The fact that Congress contemporaneously with the act of 1908 gave the increase without exception to all officers of the Navy serving beyond the continental limits of the United States is conclusive that it also intended to grant the increase to officers of the Army and Marine Corps serving in the same places.

The judgment of the court below includes the time spent in the voyage between New York and Porto Rico in both directions. In view of the provision of the act of 1902, record, top p. 4, "that the time of such service shall be counted from the date of departure from said States to the date of return thereto," no question will, we suppose, be raised as to the correctness of the inclusion of this time in the judgment, should the court hold it to have been correctly rendered on the main question.

The judgment of the Court of Claims should be affirmed.

GEORGE A. KING,
WILLIAM B. KING,
*Attorneys for Appellees.*

## APPENDIX.

### From Decisions of Comptroller of the Treasury, Vol. X, pages 849-852.

*Increase of Pay to Officers and Enlisted Men of the Marine Corps Serving Beyond the Limits of the United States.*

The act of April 23, 1904, which provided for an increase in the pay of commissioned officers and enlisted men of the Army serving in the Philippine Islands, Guam, Alaska, China, and Panama, did not operate as a repeal of the provision in the act of June 30, 1902, for an increase in the pay of commissioned officers and enlisted men of the Army serving beyond the limits of the United States; and therefore commissioned officers and enlisted men of the Marine Corps serving beyond the limits of the United States are entitled, under the act of March 3, 1901, to the increased pay provided for by said act of June 30, 1902.

(Comptroller Tracewell to the Secretary of the Navy, June 22, 1904.)

By your reference of the 10th instant requesting a decision thereon, I have received a letter from Lieut. Col. George Richards, paymaster, Marine Corps, dated May 31, 1904, submitting the following question—

"whether the enactment of April 23, 1904 (33 Stat. 266), above cited, has operated to repeal the provisions of the act of June 30, 1902 (32 Stat. 512), as quoted, so far as officers and enlisted men of the Marine Corps payable by this office and serving at the stations named are concerned; and if so, from what date should this office discontinue the credit and payment to such officers and enlisted men whose pay you may determine to be affected by this recent legislation."

The laws relating to increased pay for foreign service are as follows:

The Army appropriation act of May 26, 1900 (31 Stat.

211), making appropriations for the support of the Army for the fiscal year 1901, provides:

"For additional twenty per centum increase on pay of enlisted men, $4,524,715: *Provided*, That hereafter, the pay proper of all officers and enlisted men serving in Porto Rico, Cuba, the Philippine Islands, Hawaii, and in the Territory of Alaska shall be increased ten per centum for officers and twenty per centum for enlisted men over and above the rates of pay proper as fixed by law in time of peace."

The army appropriation act of March 2, 1901 (31 Stat. 903), making appropriations for the support of the Army for the fiscal year 1902, provides:

"For additional ten per centum increase on pay of officers serving at foreign stations, $500,000: *Provided*, That hereafter the pay proper of all officers and enlisted men serving beyond the limits of the States comprising the Union, and the Territories of the United States contiguous thereto, shall be increased ten per centum for officers and twenty per centum for enlisted men over and above the rates of pay proper as fixed by law for time of peace, and the time of such service shall be counted from the date of departure from said States to the date of return thereto: *Provided further*, That the officers and enlisted men who have served in China at any time since the 26th day of May, 1900, shall be allowed and paid for such service the same increase of pay proper as is herein provided for."

The navy appropriation act of March 3, 1901 (31 Stat. 1108), making appropriations for the support of the Navy for the fiscal year 1902, provides:

"*Provided*, That officers of the Navy and officers and enlisted men of the Marine Corps, who have been detailed or may hereafter be detailed for shore duty in Alaska, the Philippine Islands, Guam, or elsewhere beyond the continental limits of the United States, shall be considered as having been detailed for 'shore duty be-

yond seas,' and shall receive pay accordingly, with such additional pay as may be provided by law for service in island possessions of the United States."

The army appropriation act of June 30, 1902 (32 Stat. 512), making appropriation for the support of the Army for the fiscal year 1903, provides:

"For additional twenty per centum increase on pay of enlisted men, $1,771,480.34.

"For additional ten per centum increase on pay of commissioned officers serving at foreign stations, $451,456: *Provided*, That hereafter the pay proper of all commissioned officers and enlisted men serving beyond the limits of the States comprising the Union and the Territories of the United States contiguous thereto, shall be increased ten per centum for officers and twenty per centum for enlisted men over and above the rates of pay proper as fixed by law for time of peace, and the time of such service shall be counted from the date of departure from said States to the date of return thereto."

The army appropriation act of April 23, 1904 (33 Stat. 266), making appropriation for the support of the Army for that fiscal year 1905, provides:

"For additional twenty per centum increase on pay of enlisted men serving in the Philippine Islands, the Island of Guam, Alaska, China, and Panama, $533,412.51.

"For additional ten per centum increase on pay of commissioned officers serving in the Philippine Islands, the Island of Guam, Alaska, China, and Panama, $167,426.30. * * * and all laws or parts of laws inconsistent with the provisions of this act are hereby repealed."

The act of March 2, 1901, *supra*, so far as it relates to foreign service generally, is in the same language as that found in the act of June 30, 1902, *supra*, except that the latter act adds the word 'commissioned' before the word 'officers.' These two acts contain specific grants for the

Army, and by the terms of section 1612 of the Revised Statutes, the same pay is allowed to officers and enlisted men of the Marine Corps as has been allowed the officers and enlisted men of the Army in the acts above quoted.

The provisions of the act of April 23, 1904, *supra*, contain no express repeal of the prior acts but there has been a failure to appropriate sufficient money to pay the increased pay for the fiscal year 1905, so far as the Army is concerned, beyond that found in the latter act.

Where a prior act contains an express grant in prospective, I do not think a mere failure to appropriate money sufficient to pay that authorized by the prior acts can be construed as a repeal of said prior acts.

The language found in the last clause of the army appropriation act of April 23, 1904, which states that "all laws or parts of laws inconsistent with the provisions of this act are hereby repealed," does not operate to repeal any one of the prior acts. I see nothing inconsistent in the latter-mentioned act with the provisions in the prior acts, and am therefore of opinion that the provisions of the prior acts are still in force, and if there has been appropriated for the officers and enlisted men of the Marine Corps money sufficient to pay them this increased pay, they may be paid the same, as heretofore.

In making appropriations for the Marine Corps they are made in general terms as for "pay and allowances prescribed by law, of officers on the active list, and pay of noncommissioned officers, musicians, and privates, as prescribed by law." These words have been considered as sufficient to authorize the use of the appropriations therein made to pay whatever sums have been granted by law, and I see no reason why the officers and enlisted men of the Marine Corps may not be paid the increased pay provided by the acts of June 30, 1902, and March 3, 1901, *supra*.

# Supreme Court of the United States.

October Term, 1913.

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THE UNITED STATES, *Appellant*, v. NELSON P. VULTE. } No. 256.

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***APPEAL FROM THE COURT OF CLAIMS.***

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## SUPPLEMENTAL BRIEF FOR APPELLEE.

1. On the former argument, March 10, 1914, it was asked whether the construction now contended for by the claimant had ever been made by any responsible administrative officer. Such construction was made:

(*a*) By the Paymaster of the Marine Corps, June 26, 1906, on the act of 1906, in his letter, *post*, pp. 4–6, quoted in the Comptroller's decision of July 21, 1906. He directs the Assistant Paymaster "to continue to pay the foreign-service pay heretofore authorized for the officers and enlisted men of the Marine Corps serving in Hawaii until the Comptroller of the Treasury may, in specific terms, decide that such is not in accordance with his view of the law."

(*b*) The Judge-Advocate-General of the Army, the highest law officer of the War Department, has, in an official compilation of Military Laws, as shown in our original brief (p. 20), construed the act of 1908 as merely reaffirming the broad and general provisions of the acts

of 1901 and 1902 for an increase of pay for all service beyond the States and Territories of the Union.

2. Inquiry was also made on the former hearing in regard to the decision of the Comptroller on the question at issue.

Appendix A, *post*, p. 4, gives the decision in full upon the act of June 12, 1906, and Appendix B, *post*, p. 10, that upon the act of May 11, 1908.

These decisions were by the Assistant Comptroller, who is empowered by the act of July 31, 1894, Sec. 3 (28 Stat. L. 205–206), to "perform such duties as may be prescribed by the Comptroller of the Treasury," etc.

These adverse decisions were by an officer of no high departmental rank, and were opposed to the construction of the law by other administrative officers. The correctness of these decisions was promptly challenged by this very suit. They are therefore of little authority. *Swift Co.* v. *United States*, 105 U. S. 691, 695; *United States* v. *Graham*, 110 U. S. 219, 221; *United States* v. *Tanner*, 147 U. S. 661, 663; *United States* v. *Alger*, 152 U. S. 384, 397; *Webster* v. *Luther*, 163 U. S. 331, 342.

3. In our original brief, pp. 28–30, attention was called to the decision of this court in *Plummer* v. *United States*, 224 U. S. 137, holding that "the purpose of Congress to equalize as far as possible the pay of Army and Navy officers" by the two acts of May 11 and May 13, 1908, must control the construction of the terms used in the naval act of May 13, although the exact phrase used had theretofore been construed by this court in another sense.

This purpose "to place the pay of the Navy on the same basis as the Army pay" is shown in the "Statement of Managers on the Part of the House" of the conference committee on that bill. See House Report

No. 1639, 60th Congresss, 1st Session, p. 7, added hereto as Appendix C, *post*, p. 14.

As the officers of the Navy have received under the Navy act of May 13, as is clearly correct, the increase of pay here claimed by a Marine officer under the act of May 11, the principle of equality demands that the increase of pay shall be allowed him, as claimed.

GEORGE A. KING,
WILLIAM B. KING,
*Attorneys for Appellee.*

## APPENDIX A.

### From Decisions of Comptroller of the Treasury, Vol. XIII, pages 33-37.

*Increased Pay to Officers and Enlisted Men of Marine Corps for Service in Porto Rico, Hawaii, and Island of Midway.*

Commissioned officers and enlisted men of the Marine Corps, serving in Porto Rico (including the Island of Culebra) and Hawaii during the fiscal year ending June 30, 1907, are excepted by the act of June 12, 1906, from the class of beneficiaries provided by the act of June 30, 1902, are not entitled to the increased pay provided by that act for service beyond the limits of the States comprising the Union and the Territories of the United States contiguous thereto.

Commissioned officers and enlisted men of the Marine Corps, serving at stations in the Island of Midway, are not excepted by the act of June 12, 1906, from the class of beneficiaries provided by the act of June 30, 1902, and are entitled to the increased pay provided by that act for service beyond the limits of the States comprising the Union and the Territories of the United States contiguous thereto, said island not being a part of Hawaii.

(Assistant Comptroller Mitchell to the Secretary of the Navy, July 21, 1906.)

I have received by your reference with request for decision of the question therein presented the following letter dated June 26, 1906, from Col. G. C. Goodloe, paymaster, United States Marine Corps:

"1. This office has this date addressed the following communication to the assistant paymaster, United States Marine Corps, Berkeley, Cal.:

"'1. This office is in receipt of your telegram, dated the 26th inst., as follows:

"'"Marine Corps, for Paymaster, Washington, D. C.

"'"Under army appropriation act am withholding from June 12 increased pay foreign service marines, Honolulu.—Powell, A. P. M."'

"2. Your attention is invited to the decision of the Comptroller of the Treasury, dated June 22, 1904 (10 Comp. Dec. 849), which, as this office understands it, has set at rest the question as to whether the foreign-service pay of officers and enlisted men of the Marine Corps is governed by such limitations of the amounts of money appropriated as may be contained in acts making appropriations for the support of the Army, unless in the language of the act contemplated there is contained in specific terms an express repeal of the statutes which have theretofore granted this increase. This office sees nothing in the act approved June 12, 1906, making appropriations for the support of the Army for the fiscal year ending June 30, 1907, which can be construed as such a repeal of the act of March 2, 1901 (31 Stat. 903), but if such should be otherwise, it remains clear that the act of March 3, 1901 (31 Stat. 1108), at least has not been repealed. This later enactment contains a specific grant to the Marine Corps of that which was authorized by the prior act under the terms of section 1612, Revised Statutes, and, as this office understands the law, even though the former act may be specifically repealed, which is not admitted, the officers and enlisted men of the Marine Corps may continue to properly receive the foreign-service pay authorized by the later law until such be likewise repealed. You are therefore directed to continue to pay the foreign-service pay heretofore authorized for the officers and enlisted men of the Marine Corps serving in Hawaii until the Comptroller of the Treasury may in specific terms decide that such is not in accordance with his view of the law.

"2. It is respectfully suggested that the question therein presented, which this office has conditionally passed upon, may be submitted to the Department with the recommendation that the Secretary of the Navy request a decision thereon by the Comptroller of the Treasury, which decision is desired for the guidance of the paymaster's department of the corps in future payments

of foreign-service pay under the jurisdiction of the Navy Department, not only to the officers and enlisted men serving in the Hawaiian Islands, including the Island of Midway, but also to those serving in the Island of Porto Rico, including Culebra, West Indies."

The act of June 30, 1902 (32 Stat. 512), making appropriation for the support of the Army for the fiscal year 1903, provides—

"For additional twenty per centum increase on pay of enlisted men, $1,771,480.34.

"For additional ten per centum increase on pay of commissioned officers serving at foreign stations, $451,456: *Provided*, That hereafter the pay proper of all commissioned officers and enlisted men serving beyond the limits of the States comprising the Union and the Territories of the United States contiguous thereto shall be increased ten per centum for officers and twenty per centum for enlisted men over and above the rates of pay proper as fixed by law for time of peace, and the time of such service shall be counted from the date of departure from said States to the date of return thereto."

The act of April 23, 1904 (33 Stat. 266), making appropriations for the support of the Army for the fiscal year 1905, provides—

"For additional twenty per centum increase on pay of enlisted men serving in the Philippine Islands, the Island of Guam, Alaska, China, and Panama, $533,412.51.

"For additional ten per centum increase on pay of commissioned officers serving in the Philippine Islands, the Island of Guam, Alaska, China, and Panama, $167,426.30; * * * and all laws or parts of laws inconsistent with the provisions of this act are hereby repealed."

The act of June 12, 1906 (34 Stat. 247), Public No. 224, making appropriation for the support of the Army for the fiscal year 1907, provides—

"For additional twenty per centum increase on pay of enlisted men serving beyond the limits of the States comprising the Union and the Territories of the United States contiguous thereto (excepting Porto Rico and Hawaii), as provided by act approved June 30th, 1902, the time of such service to be counted from the date of departure from said States to the date of return thereto, $540,369.48.

"For additional ten per centum increase on pay of commissioned officers serving beyond the limits of the States comprising the Union and the Territories of the United States contiguous thereto (excepting Porto Rico and Hawaii), as provided by act approved June 30th, 1902, the time of such service to be counted from the date of departure from said States to the date of return thereto, $200,201.39: *Provided*, That the appropriations for the pay of the Army for the fiscal years ending June 30th, 1905, and June 30th, 1906, shall be available for the payment of the increase for service at foreign stations to which commissioned officers and enlisted men are entitled under the provisions of the act of June 30th, 1902. * * *"

By section 1612 of the Revised Statutes, officers and enlisted men of the Marine Corps are entitled to the same pay as or may be provided by law for officers and enlisted men of like grades in the infantry of the Army, and by virtue of said section and the act of March 3, 1901 (31 Stat. 1108), they are entitled to the increase of pay provided by the act of June 30, 1902.

In 10 Comp. Dec. 849, it was held that—

"The act of April 23, 1904, which provided for an increase in the pay of commissioned officers and enlisted men of the Army serving in the Philippine Islands, Guam, Alaska, China, and Panama, did not operate as a repeal of the provision in the act of June 30, 1902, for an increase in the pay of commissioned officers and enlisted men of the Army serving beyond the limits of the United States; and therefore commissioned officers and enlisted men of the Marine Corps serving beyond the

limits of the United States are entitled, under the act of March 3, 1901, to the increased pay provided for by said act of June 30, 1902."

The act of June 30, 1902, declared that commissioned officers and enlisted men of the Army serving at stations beyond the limits of the States comprising the Union and the Territories of the United States contiguous thereto should receive the higher rate of pay, without limitation as to time. The act of April 23, 1904, without in any way referring to the act of June 30, 1902, made an appropriation to pay the higher rate of pay to commissioned officers and enlisted men serving at the particular places therein named, and it was held in the above decision that the latter act was not inconsistent with or repugnant to the act of June 30, 1902. In other words, the mere fact that Congress by the act of April 23, 1904, appropriated to pay the higher rate of pay to said officers and men serving in the places therein named did not abrogate or repeal the above provision of the act of June 30, 1902.

The act of April 23, 1904, did not refer to or mention the act of June 30, 1902, and it covered but a part of the subject-matter of the act of June 30, 1902.

The act of June 12, 1906, covers the whole subject-matter of the act of June 30, 1902, expressly refers to, and I am of opinion it is a limitation upon that act. I am of opinion that by the act of June 12, 1906, Congress intended to revise the class of beneficiaries as provided by the act of June 30, 1902, and to except therefrom all commissioned officers and enlisted men serving at stations in Porto Rico and Hawaii. In other words, by the act of June 12, 1906, for the fiscal year ending June 30, 1907, commissioned officers and enlisted men serving in Porto Rico and Hawaii are excepted from the class of beneficiaries provided by the act of June 30, 1902, and are not entitled to said higher rate of pay.

I am also of opinion that commissioned officers and enlisted men of the Marine Corps serving in Porto Rico, including the island of Culebra as part of Porto Rico, and Hawaii during the fiscal year ending June 30, 1907, are not entitled for such service to the increased pay provided by the act of June 30, 1902. I am also of opinion that commissioned officers and enlisted men of the Marine Corps serving at stations in the island of Midway are entitled for such service to said higher pay, for the reason that, as I understand, said island is not a part of Hawaii.

## APPENDIX B.

### From Decisions of Comptroller of the Treasury, Vol. XIV, pages 841–846.

*Foreign-Service Pay for Service in Porto Rico and Hawaii.*

[As only a portion of this decision relates to the question here involved, only the part material to this question is here given.]

* * * * * * *

The increase of pay provided by the act of May 11, 1908, for foreign service of officers and enlisted men of the Army during the fiscal year 1909, is not payable to officers and enlisted men of the Regular Army, and of the Porto Rico Provisional Regiment for service in Porto Rico and Hawaii after June 30, 1908.

* * * * * * *

(Assistant Comptroller Mitchell to the Secretary of War, June 2, 1908.)

I have received your communication of the 21st instant requesting my decision of questions presented by the Paymaster-General of the Army, as follows:

"With reference to the Army appropriation act for the fiscal year 1909, approved May 11, 1908 (Public 112), I have the honor to request that the decision of the Comptroller of the Treasury be obtained for the guidance of officers of the Pay Department upon the following questions having relation to payments to be made under said act:

* * * * * * *

"2. The act of June 12, 1906 (34 Stat. 247), and the act of March 2, 1907 (34 Stat. 1164), provided that—

"'For additional twenty per centum increase on pay of enlisted men serving beyond the limits of the States comprising the Union and the Territories of the United States contiguous thereto (excepting Porto Rico and Hawaii), as provided by act approved June 30, 1902'—

"and the same wording is used in the appropriation for ten per centum increase on pay of officers serving beyond the limits of the States.

"The act of May 11, 1908, makes an appropriation for foreign-service increase, but does not contain the provision exempting service in Porto Rico and Hawaii from its benefits. Decision is therefore requested whether, after June 30, 1908, foreign-service increase is payable to officers and enlisted men of the Regular Army serving in Porto Rico and Hawaii, and to officers and men of the Porto Rico Provisional Regiment of Infantry.

* * * * * * *

The three questions submitted will be taken up and considered in their order.

* * * * * * *

QUESTION 2.

The act of June 30, 1902 (32 Stat. 512), making appropriation for the support of the Army for the fiscal year 1903, provides:

"For additional twenty per centum increase on pay of enlisted men, $1,771,480.34.

"For additional ten per centum increase on pay of commissioned officers serving at foreign stations, $451,-456: *Provided*, That hereafter the pay proper of all commissioned officers and enlisted men serving beyond the limits of the States comprising the Union and the Territories of the United States contiguous thereto shall be increased ten per centum for officers and twenty per centum for enlisted men over and above the rates of pay proper as fixed by law for time of peace, and the time of such service shall be counted from the date of departure from said States to the date of return thereto."

The act of June 12, 1906 (34 Stat. 247), making appropriation for the support of the Army for the fiscal year 1907, provides:

"For additional twenty per centum increase on pay of enlisted men serving beyond the limits of the States com-

prising the Union and the Territories of the United States contiguous thereto (excepting Porto Rico and Howaii), as provided by act approved June 30th, 1902, the time of such service to be counted from the date of departure from said States to the date of return thereto, $540,-369.48.

"For additional ten per centum increase on pay of commissioned officers serving beyond the limits of the States comprising the Union and the Territories of the United States contiguous thereto (excepting Porto Rico and Hawaii), as provided by act approved June 30th, 1902, the time of such service to be counted from the date of departure from said States to the date of return thereto, $200,201.39: *Provided*, That the appropriations for the pay of the Army for the fiscal years ending June 30th, 1905, and June 30th, 1906, shall be available for the payment of the increase for service at foreign stations to which commissioned officers and enlisted men are entitled under the provisions of the act of June 30th, 1902. * * * ."

The act of March 2, 1907 (34 Stat. 1164), making appropriation for the support of the Army for the fiscal year 1908, contains a provision identical in terms with the act of June 12, 1906, except as to the amount appropriated.

In 13 Comp. Dec. 33, it was held that commissioned officers and enlisted men serving in Porto Rico and Hawaii during the fiscal year 1907 were excepted by the act of June 12, 1906, *supra*, from the class of beneficiaries provided by the act of June 30, 1902, *supra*, and were not entitled during said fiscal year to the increase of pay provided by said act of June 30, 1902, for service beyond the limits of the States comprising the Union and the Territories of the United States contiguous thereto. The same exception applies to men serving in said places during the fiscal year 1908.

The act of May 11, 1908 (Public No. 112, pages 6 and

10), making appropriation for the support of the Army for the fiscal year 1909, provides:

"* * * That increase of pay for service beyond the limits of the States comprising the Union and the Territories of the United States contiguous thereto shall be as now provided by law. * * *

"For additional ten per centum increase on pay of officers on foreign service, $285,000.

"For additional twenty per centum increase to enlisted men on foreign service, $767,000: * * *"

The increase of pay for foreign service provided by law at the time of the approval of the act of May 11, 1908, was that authorized by the act of June 30, 1902, as limited by the act of March 2, 1907, making appropriation for the fiscal year 1908.

As under said laws increase of pay for foreign service was not given to commissioned officers and enlisted men serving in Porto Rico and Hawaii, such persons are not entitled to said increase of pay under the act of May 11, 1908, *supra*. The effect of the above provision in the act of May 11, 1908, is to continue the limitation imposed by the act of March 2, 1907, and under said provision I am of opinion that increase of pay for foreign service after June 30, 1908, is not payable to the officers and enlisted men of the Regular Army and the officers and men of the Porto Rico Provisional Regiment of Infantry serving in Porto Rico and Hawaii.

## APPENDIX C.

*Extract from Statement of Managers on the Part of the House, annexed to Conference Report on Naval Appropriation Act of May 13, 1908, House Report No. 1639, 60th Congress, 1st Session, page 7.*

Amendment No. 2 provides for the pay of all officers and enlisted men of the Navy. This amendment places the pay of the Navy on the same basis as the army pay or as near as it is possible to do so, as provided in the bill (H. R. 17288) as amended by the Senate and agreed to in conference by both Houses making appropriation for the support of the Army for the fiscal year ending June 30, 1909. This amendment provides for an increase of $500 in all the grades from rear-admiral to ensign, with the exception of the grade of lieutenant, which is increased $600 and that of ensign $300 per annum. It provides for the 10 per cent longevity up to 40 per cent, provided that the pay of a captain shall not exceed $5,000 per annum; of commander $4,500 per annum, and of lieutenant-commander $4,000 per annum. It likewise provides for a 10 per cent increase for all officers on sea duty and all officers on shore duty beyond the continental limits of the United States. This provides for the officers of the Navy the same additional pay as enjoyed by officers of the Army when performing similar duty.

It also provides for the pay of midshipmen at the Naval Academy in the same manner as is provided for cadets at the Military Academy and increases the pay of midshipmen after graduation from the Naval Academy from $950 to $1,400 per annum. It also provides for an increase of 10 per cent for all enlisted men of the Navy on the active and on the retired list.

The amendment also provides that the chiefs of bureaus in the Navy Department shall have the highest pay of the grade to which they belong, placing them on the same basis as officers holding like positions in the Army, and likewise placing the pay of chaplains on the same basis as provided in the Army. Aids to rear-admirals are

granted a similar increase to that provided in the Army.

An officer of the Navy after having had thirty years' service may upon his own application, in the discretion of the President, retire from active service and be placed on the retired list, thereby placing the Navy on the same basis as other branches of the military service in this respect. And the House recedes from its disagreement and agrees to the Senate amendment as above amended.

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No. 256.

# In the Supreme Court of the United States.

OCTOBER TERM, 1913.

THE UNITED STATES, APPELLANT,

v.

NELSON P. VULTE.

APPEAL FROM THE COURT OF CLAIMS.

## REPLY BRIEF FOR THE UNITED STATES.

WASHINGTON: GOVERNMENT PRINTING OFFICE: 1914

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OCTOBER TERM, 1913.

THE UNITED STATES, APPELLANT,
v.
NELSON P. VULTE. } No. 256.

*APPEAL FROM THE COURT OF CLAIMS.*

## REPLY BRIEF FOR THE UNITED STATES.

Reply to appellee's brief becomes necessary for the reason that the Government differs with appellee in respect to many statements set forth in his brief.

The first subject to which we invite the attention of the court is the construction placed upon the decision of the Comptroller of the Treasury (10 Comp. Dec., pp. 849–852), dealing with increase of pay to officers and enlisted men of the Marine Corps serving beyond the limits of the United States and Territories contiguous thereto.

In their brief, on page 4, counsel for appellee say:

> The decision of the Comptroller of the Treasury, referred to by the court toward the close of its opinion (Rec., p. 5), is so pertinent and

applicable to the question in this case that it is annexed to this brief as an appendix (*post*, pp. 32–35).

This decision held that the appropriation of April 23, 1904 (33 Stat. L., 266), amounted only to "a failure to appropriate sufficient money to pay the increased pay for the fiscal year 1905, so far as the Army is concerned."

As the appropriations for the Marine Corps were made simply in general terms for "pay and allowances prescribed by law," etc., he held that there was not even a failure to appropriate, and that those serving in the Marine Corps were entitled to receive ten per cent increase pay, while serving in Porto Rico and Hawaii, out of the current appropriation made by the act of 1904 for the year ending June 30, 1905.

The part to which we particularly object is underlined.

In order that we may show wherein this statement is incorrect, it becomes necessary for us to go into the history of the legislation dealing with increases of pay for service outside of the United States and contiguous territories.

**ARMY APPROPRIATION ACT OF MAY 26, 1900 (31 Stat L., 211).**

This act making appropriations for the support of the Army for the fiscal year of 1901 provides:

> For additional twenty per centum increase of pay of enlisted men, $4,524,715: *Provided*, That hereafter the pay proper of all officers and

> enlisted men serving in Porto Rico, Cuba, the Philippine Islands, Hawaii, and in the Territory of Alaska shall be increased ten per centum for officers and twenty per centum for enlisted men over and above the rates of pay proper as fixed by law in time of peace.

We have called attention to this act in order to show that from time to time Congress has increased or diminished the territorial definition of "foreign stations." It did this presumably because it was attempting in its legislation to follow the movements of the Army.

**ARMY APPROPRIATION ACT OF MARCH 2, 1901 (31 Stat. L., 903).**

This act, making appropriations for the support of the Army for the fiscal year of 1902, provides:

> For additional ten per centum increase on pay of officers serving at foreign stations, $500,000: *Provided*, That hereafter the pay proper of all officers and enlisted men serving beyond the limits of the States comprising the Union, and the Territories of the United States contiguous thereto, shall be increased ten per centum for officers and twenty per centum for enlisted men over and above the rates of pay proper as fixed by law for time of peace, and the time of such service shall be counted from the date of departure from said States to the date of return thereto: *Provided further*, That the officers and enlisted men who have served in China at any time since the twenty-sixth day of May, nineteen hundred, shall be allowed and paid for such

service the same increase of pay proper as is herein provided for.

The proviso attached to this act giving increased pay to the men who "served in China at any time since the 26th day of May, 1900," indicates that Congress intended to give increased pay for back service from May 26, 1900, to March 2, 1901, to the men who had served in China, because China had not been designated as a foreign station in the act of May 26, 1900.

**ARMY APPROPRIATION ACT OF JUNE 30, 1902 (32 Stat. L. 512).**

This act, making appropriations for the fiscal year of 1903, provides:

> For additional ten per centum increase on pay of commissioned officers serving at foreign stations, $451,456: *Provided*, That hereafter the pay proper of all commissioned officers and enlisted men serving beyond the limits of the States comprising the Union and the Territories of the United States contiguous thereto shall be increased ten per centum for officers and twenty per centum for enlisted men over and above the rates of pay proper as fixed by law for time of peace, and the time of such service shall be counted from the date of departure from said States to the date of return thereto.

The act of June 30, 1902, is identical with the act of 1901, except that the word "commissioned" has been inserted before the word "officers."

ACT OF JULY 1, 1902 (32 Stat. L., 560).

At this point the attention of the court is called to an act which undoubtedly controlled the disbursement of the paymasters of the Army in 1904, and influenced the Comptroller of the Treasury when rendering his decision for the paymaster of the Marine Corps dealing with increase of pay to officers and enlisted men of the Marine Corps serving beyond the limits of the United States, *supra*, which will be examined in this brief hereafter in connection with another act.

It is as follows:

> Hereafter no act of Congress shall be construed to make an appropriation out of the Treasury of the United States unless such act shall, in specific terms, declare an appropriation to be made for the purpose or purposes specified in the act.

In 1904, however, Congress, for the first time since 1900, defined in specific terms the territorial limits within which a foreign station could be located.

ARMY APPROPRIATION ACT OF APRIL 23, 1904 (33 Stat. L., 266).

This act, making appropriations for the support of the Army for the fiscal year of 1905, provides:

> For additional twenty per centum increase on pay of enlisted men serving in the Philippine Islands, the Island of Guam, Alaska, China, and Panama, $533,412.51.
>
> For additional ten per centum increase on pay of commissioned officers serving in the Philippine Islands, the Island of Guam,

> Alaska, China, and Panama, $167,426.30; * * * and all laws or parts of laws inconsistent with the provisions of this act are hereby repealed.

The act of April 23, 1904, not only defined the territorial limits of foreign stations specifically, but added a repealing clause and failed to appropriate increased pay for service at stations not named in the act.

On May 31, 1904, the Comptroller of the Treasury received a request for an opinion from Lieut. Col. George Richards, Paymaster of the Marine Corps, as to whether the act of April 23, 1904, operated to repeal the provisions of the act of June 30, 1902, in so far as officers and enlisted men of the Marine Corps serving at Sitka, Alaska; Hawaii, and the Island of Midway, in the Pacific, were concerned. (Appendix A to this brief.) In reply to this request the Comptroller of the Treasury rendered the decision found in volume 10, page 849, Comptroller's Decisions, and set out in full in the appendix to appellee's brief. The counsel for appellee contend that this decision of the comptroller held that officers of the "Marine Corps were entitled to receive ten per cent increase pay, while serving in Porto Rico and Hawaii, out of the current appropriation made by the act of 1904 for the year ending June 30, 1905."

The comptroller, in his decision, says:

> The provisions of the act of April 23, 1904, *supra*, contain no express repeal of the prior acts, but there has been a failure to appro-

priate sufficient money to pay the increased pay for the fiscal year 1905, so far as the Army is concerned, beyond that found in the latter act. [Act of Apr. 23, 1904.]

Where a prior act contains an express grant in prospective, I do not think a mere failure to appropriate money sufficient to pay that authorized by the prior acts can be construed as a repeal of said prior acts.

Reading these two paragraphs in the light of the question propounded to the comptroller by Col. Richards and in connection with the rest of his decision, we find it to mean as follows:

That the act of 1904, while appropriating moneys for the additional pay for service at the foreign stations named therein, did not appropriate moneys for additional service at stations outside of those designated in the act of 1904, and therefore there was no money to allow additional pay at the places named by Col. Richards.

The comptroller held that simply because Congress had failed to appropriate for stations outside the Philippine Islands, the island of Guam, Alaska, China, and Panama, it did not repeal the act of 1902, so far as stations outside of the aforenamed places are concerned. He stated, in substance, that he did not think that the language used in the act of 1904, limiting the definition of territory comprehending foreign stations, to be in conflict with the general language of the act of 1902 describing foreign territory to be any territory outside of the United States or the territories contiguous thereto.

Further, replying to Col. Richards, the Comptroller of the Treasury said that he did not see any reason why the officers and enlisted men of the Marine Corps might not be paid the increased pay provided by the acts of June 30, 1902, and March 3, 1901, *supra*. This, of course, should be considered in connection with what he had already said, that while the acts of 1901 and 1902 were not repealed by the act of 1904, there was no money in the appropriation act of 1904 to give additional pay to men serving at stations not named in that act.

It will thus be seen that the appellee is in error when he says that this decision of the Comptroller of the Treasury held that those serving in the Marine Corps were entitled to receive 10 per cent increase pay while serving in Hawaii and Porto Rico out of the current appropriation made by the act of 1904 for the year ending June 30, 1905.

As we have already said, the Comptroller of the Treasury in rendering his opinion was governed by the act of July 1, 1902, *supra*, which limited the payment for additional service at foreign posts to those stations named in the act of 1904.

ARMY APPROPRIATION ACT OF MARCH 2, 1905 (33 Stat. L., 832).

This act appropriating for the support of the Army for the fiscal year of 1906 described the territorial definition of foreign stations in terms identical with those of the act of April 23, 1904, and appropriated exactly the same amount.

**ARMY APPROPRIATION ACT OF JUNE 12, 1906 (34 Stat. L., 247).**

On June 12, 1906 (34 Stat. L., 247), Congress provided—

> For additional 10 per cent increase on pay of commissioned officers serving beyond the limits of the States comprising the Union and the Territories of the United States contiguous thereto (excepting Porto Rico and Hawaii), as provided by act approved June 30, 1902, the time of such service to be counted from the date of departure from said States to the date of return thereto. * * *

It has been conceded by appellee that for the fiscal years ending June 30, 1905, and June 30, 1906, the accounting officers had refused to pay enlisted men or officers of the Marine Corps or the Army additional pay for services outside of the Philippine Islands, the island of Guam, Alaska, China, and Panama, designated as stations in the act of April 23, 1904.

By the act of June 12, 1906, however, Congress specifically *excepted Porto Rico and Hawaii* from the definition of foreign stations wherein additional pay for services would be granted, using language in connection with the exception identical with that used in the act of 1902 in describing foreign stations where additional pay would be granted for services. At the same time Congress referred to the act of June 30, 1902, in such a way as to indicate an intention to amend the act so as to exclude them in the future.

Thus far the act of 1906 was looking to the future, but at the end of the act there was a proviso added

in which Congress was looking back to the past. This proviso declared that the appropriations for the pay of the Army for the fiscal years ending June 30, 1905, and June 30, 1906, should be available for increased pay for service at foreign stations to which commissioned officers and enlisted men were entitled under the provisions of the act of June 30, 1902. In other words, Congress said that whatever was left of the appropriations made in the acts of 1904 and 1905 could be used to give additional pay for foreign service to those who had served at stations not mentioned in the acts of 1904 and 1905, but who did come within the definition of foreign territory where additional pay would be allowed, as described by the act of 1902. There was a reason for this. The decision of the comptroller of June 22, 1904, heretofore referred to, held that the appropriation of 1904 could not be used for that purpose, and the paymasters refused to give such additional pay to officers serving at stations not named in the acts of 1904 and 1905.

It would seem to us very apparent that Congress said, in substance, that as the comptroller had held that the act of 1904 did not repeal *pro tanto* the act of 1902 in so far as the definition of foreign stations was concerned, it would add this proviso, so as to conform to the ruling of the comptroller during the past, but that it would now expressly state by using the words "excepting Porto Rico and Hawaii" that for the future it would no longer consider those places as foreign territory wherein additional pay would be allowed for services.

The same comptroller evidently understood what was meant by the express exception of Porto Rico and Hawaii in the act of June 12, 1906, for he rendered a decision through his assistant on July 21, 1906, construing the act of 1906 to mean that Porto Rico and Hawaii were permanently excepted from the definition of foreign territory where increased pay for services would be allowed. This decision is found in Volume XIII, Comptroller's Decisions, pages 33, 37, and in appendix "B" to this brief.

**ARMY APPROPRIATION ACT OF MARCH 2, 1907 (34 Stat. L., 1164).**

This act made appropriation for the support of the Army for fiscal year of 1908. It contains a provision identical in terms with the act of June 12, 1906, except as to the amount appropriated.

**ARMY APPROPRIATION ACT OF MAY 11, 1908 (35 Stat. L., 108).**

This act making appropriations for the support of the Army for the fiscal year of 1909 provided:

> That increase of pay for service beyond the limits of the States comprising the Union and the Territories of the United States contiguous thereto shall be as now provided by law.

The phrase "as now provided by law" at the time of the passage of the act was undoubtedly intended to refer to the territorial limits for foreign service where additional pay would be allowed as defined in the respective acts of June 12, 1906, and March 2, 1907. The words "as now provided by law" were so understood by the same comptroller who had rendered

the decisions construing the acts of 1904 and 1906. This last decision construing the act of 1908 was drafted by Assistant Comptroller Mitchell and is found in XIV Comptroller's Decisions, pages 841–846, and in Appendix C to this brief.

The act of June 12, 1906, having been construed by the comptroller and the act of May 11, 1908, having been prepared with reference to the act of 1906, so far as the definition of foreign stations was concerned, must necessarily refer back to the territorial definition of foreign stations as set forth in the act of 1906 and as construed by the comptroller. (*Sessions* v. *Romadka*, 145 U. S., 41, 42; *Claflin & Others* v. *Commonwealth Insurance Company*, 110 U. S., 81; *The "Abbotsford,"* 98 U. S., 440; *Plummer* v. *United States*, 224 U. S., 137, 140.)

The Army appropriation acts of 1909, 1910, and 1911, respectively, simply make appropriation for services outside the limits of the United States and the Territories contiguous thereto in conformity with existing law as construed by the comptroller.

**ARMY APPROPRIATION ACT OF AUGUST 24, 1912 (37 Stat. L., 576).**

This act makes appropriations for the support of the Army for the fiscal year of 1913, in the following clause:

> That hereafter the laws allowing increase of pay to officers and enlisted men for foreign service shall not apply to service in the Canal Zone, Panama, or Hawaii, or Porto Rico.

It became necessary to redefine the territorial limits wherein additional pay for foreign service would be allowed in the year 1912, so Congress redefined the territorial limits of foreign stations in this act by cutting out the Canal Zone, Panama, Hawaii, and Porto Rico.

Since the passage of the act of 1906, the accounting officers of the Treasury have uniformly disallowed increased pay for service in Porto Rico and Hawaii. Such contemporaneous, uniform, and continuous construction is, we submit, entitled to great weight and should not be overruled without cogent reasons. (*Brown* v. *United States*, 113 U. S., 568; *Schells, executor*, v. *Fouche*, 138 U. S., 562; *Hewitt* v. *Shultz*, 180 U. S., 139; *United States* v. *Healey*, 160 U. S., 136; *United States* v. *Sweet*, 189 U. S., 471.) When such construction has been approved by Congress, as was done by the act of 1912, it is conclusive.

**REASONS FOR ALLOWING INCREASED PAY FOR NAVAL SERVICE IN PORTO RICO AND HAWAII.**

Counsel for appellant says (p. 28, brief):

> Any possible doubt of the intention of Congress is removed by a comparison of the statute of May 11, 1908, increasing the pay of the Army, with the contemporaneous statute of May 13, 1908, increasing the pay of the Navy. (35 Stat. L., 108–110, 127, 128.)

The Navy act says (35 Stat. L., 128):

> All officers on sea duty and all officers on shore duty beyond the continental limits of

> the United States shall while so serving receive ten per centum additional of their salaries and increase as above provided, and such increase shall commence from the date of reporting for duty on board ship or the date of sailing from the United States for shore duty beyond the seas or to join a ship in foreign waters.

Counsel further calls attention to the case of *Plummer* v. *The United States* (224 U. S., 137) and quotes therefrom the following language (p. 144):

> In view of the purpose of Congress *to equalize as far as possible* the pay of Army and Navy officers, manifested by the adoption of the Navy personnel act of 1899 and in all subsubsequent legislation as to such pay, etc. (Italics ours.)

It is apparent from the use of the phrase "to equalize as far as possible" that this court had in mind the possibility that the pay of Army and Navy officers could not be exactly the same, and so used the phrase quoted.

It will be observed that the question in the Plummer case arose out of a difference over longevity pay to which the appellant contended he was entitled. Longevity pay is computed upon base pay. Mr. Justice White in the quotation in counsel's brief was, as we understand it, speaking about the intention of Congress to keep the base pay and longevity pay of officers of the Army and the Navy as nearly equal as possible, but base pay, in the very nature of things, can not be measured by conditions of service

for which "extra pay" would be allowed. Additional or extra pay, as presented in the case at bar, is determined by the hazardous or onerous character of the service, while longevity pay is based on length of service.

The reason why the pay of Army and Navy officers is not exactly the same is accounted for by the difference in the character of the service. For instance, a Naval officer while on sea duty is frequently put to a greater expense by being compelled to maintain two establishments. On the other hand, an Army officer stationed at Porto Rico may establish his family in barracks furnished for the Army, and his situation, so far as expense is concerned, would be similar to that when stationed in the United States.

Again, there would be a difference between the expenses incurred by a naval officer assigned to shore duty at Porto Rico, and an Army officer living in barracks at the same place. The naval officer would be compelled necessarily to reside in hotels or boarding houses, where his expenses would be greater than those of an Army officer in quarters.

It would therefore appear, generally speaking, that there is a reason for not limiting the definition of territory where additional pay should be granted for foreign service so far as naval officers are concerned. But, regardless of the reasons applying to naval officers it is clear from the action of Congress in passing the Army appropriation act of 1912, supra, a distinction was again made, so far as certain territory

was concerned, with respect to additional pay of Army officers for the future, since the act of 1912 specifically declared that there should not be increased pay for service in the Canal Zone, Panama, Hawaii, or Porto Rico. Can it not be fairly presumed that Congress drew this distinction because the service was no longer onerous or dangerous? This question had been before Congress from 1904 on, and it is shown by the Congressional Records in 1904 that Congress made a distinction with regard to Army officers on the ground of onerous service. (See Senate committee report on this provision in act of Apr. 23, 1904, 33 Stat., 264–265; Government's original brief, p. 10.)

The provision upon which the committee reported is as follows:

> For pay of the enlisted men of the Army on the retired list, eight hundred and two thousand four hundred and ninety-eight dollars: *Provided*, That hereafter in computing the length of service for retirement credit shall be given soldiers for double the time of their actual service in China, Cuba, the Philippine Islands, the island of Guam, Alaska, and Panama; but double credit shall not be given for service hereafter rendered in Porto Rico or the Territory of Hawaii.

This distinction could also have been drawn because shore duty beyond seas as a general proposition was more dangerous than shore duty at home, due to the diseases of tropical climates and the

hardships of winters in territories such as Alaska. But in Porto Rico, Hawaii, and Panama, where this Government has obtained a firm foothold and which have become in effect a part of the United States, tropical diseases have been practically eliminated. Some of these territories are now regarded as health resorts and service there considered desirable.

**ILLUSTRATION OF THE MEANING OF THE PHRASE "TO EQUALIZE AS FAR AS POSSIBLE," AS APPLIED TO THE DIFFERENCE BETWEEN ARMY AND NAVY PAY.**

The meaning of the phrase "to equalize as far as possible," as applied to the difference between Army and Navy pay, is illustrated by the status of an acting assistant surgeon in the Navy, as shown in the Plummer case, *supra*, and that of an acting assistant, or contract, surgeon in the Army, as stated in section 2 of the act of May 12, 1898 (30 Stat., 406). According to the decision in the Plummer case, an acting assistant surgeon had the same rank and pay as an assistant surgeon in the regular service, which was as follows: At sea, $1,650 a year; on shore with quarters, $1,402.50; on shore without quarters, $1,690.50 a year. An acting assistant surgeon in the Navy also had the rank of lieutenant (junior grade).

On the other hand, contract surgeons in the Army, who were also known as acting assistant surgeons, were appointed under section 2 of the act of May 12, 1898, where it was provided as follows (sec. 2):

> That in emergencies the Surgeon General of the Army, with the approval of the Secretary of War, may appoint as many contract

surgeons as may be necessary, at a compensation not to exceed one hundred and fifty dollars per month.

It will thus be seen that an acting assistant surgeon in the Navy was given rank, and therefore entitled to 10 per cent increase for foreign service and longevity pay, while a contract surgeon in the Army received a salary *not to exceed* $150 a month, and, having no rank, was not entitled to longevity or increased pay for foreign service, although both performed practically the same duties.

The Army Regulations of 1901, paragraph 1574, declares that a contract surgeon in the Army is "not entitled to commutation of quarters, nor the 10 per cent increase of pay when serving beyond the territorial limits of the United States," while an acting assistant surgeon in the Navy under the law would be.

In the case of *Byrne* v. *United States* (26 C. Cls., 302–306) it was held that an acting assistant surgeon in the Army had no rank and was not entitled to longevity pay.

On October 22, 1900, the comptroller held that a contract surgeon, also called acting assistant surgeon, in the Army, was not entitled to the 10 per cent increase for service in Porto Rico, Cuba, Philippine Islands, Hawaii, and Alaska above the rates of pay proper fixed by law (7 Comp., 195–196).

On November 16, 1903 (10 Comp., 424), the comptroller rendered a decision holding that an officer of the Army was not entitled to longevity pay for service as a contract or acting assistant surgeon, and referred

for authority to his decision in the Seventh Comptroller, above cited.

On July 4, 1909, the Solicitor General, Mr. Bowers, rendered an exhaustive opinion (27 Atty. Gen. Op., 468) on the right of an Army officer below the grade of a brigadierg eneral who served as a contract or acting assistant surgeon in the Civil War prior to April 9, 1865, to retirement with a higher grade and rank under the act of April 23, 1904 (33 Stat., 364), and citing the Byrnscase, *supra*, held that he did not come within the provisions of the act.

Respectfully submitted.

HUSTON THOMPSON,
*Assistant Attorney General.*

## APPENDIX A.

OFFICE OF ASSISTANT PAYMASTER,
UNITED STATES MARINE CORPS,
*San Francisco, Cal., May 31, 1904.*

SIR: Referring to the following contained in the act approved June 30, 1902 (32 Stat., 512), making appropriations for the support of the Army for the fiscal year ending June 30, 1903, viz:

For additional twenty per centum increase on pay of enlisted men, one million seven hundred and seventy-one thousand four hundred and eighty dollars and thirty-four cents.

For additional ten per centum increase on pay of commissioned officers serving at foreign stations, four hundred and fifty-one thousand four hundred and fifty-six dollars: *Provided*, That hereafter the pay proper of all commissioned officers and enlisted men serving beyond the limits of the States comprising the Union and the Territories of the United States contiguous thereto shall be increased ten per centum for officers and twenty per centum for enlisted men over and above the rates of pay proper as fixed by law for time of peace, and the time of such service shall be counted from the date of departure from said States to the date of return thereto—

it has been observed that while there is specified in the act approved March 2, 1903, making similar appropriations for the current fiscal year, an estimate for appropriation of 10 per cent increase on pay for officers and a 20 per cent increase on pay for enlisted men of the Army "serving at foreign stations," the act approved April 23, 1904 (33 Stat., 266), however, making appropriations for the support of the Army for the next fiscal year without in specific terms repealing the above-cited clause, has limited the estimate for appropriation on account of foreign service pay in the Army to the following:

For additional twenty per centum increase on pay of enlisted men serving in the Philippine Islands, the island of Guam, Alaska, China, and Panama, five hundred and thirty-three thousand four hundred and twelve dollars and fifty-one cents.

For additional ten per centum increase on pay of commissioned officers serving in the Phillipine Islands, the island

of Guam, Alaska, China, and Panama, one hundred and sixty-seven thousand four hundred and twenty-six dollars and thirty cents.

The final clause of this act stipulates in general terms: "All laws or parts of laws inconsistent with the provisions of this act are hereby repealed."

2. During the period since the enactment of the legislation of June 30, 1902, officers and enlisted men of the Marine Corps whose accounts are payable here, which come within the meaning of the clause cited, have been paid, under the provisions of section 1612 of the Revised Statutes, the increased pay for the service therein described. The appropriations for the Marine Corps have not in the past, nor do they now, contain any specific estimate for appropriations for pay for foreign service for officers and enlisted men of the Marine Corps similar to the Army acts referred to. There is contained, however, the general item for appropriation for "pay and allowances prescribed by law of officers on active list" and "pay of noncommissioned officers, musicians, and privates, as prescribed by law," which has been interpreted to cover the case.

3. On this date there are carried on rolls payable by the undersigned, accounts of officers and enlisted men of the Marine Corps, stationed at marine barracks, Sitka, Alaska, those serving at the naval station, Hawaii, Honolulu, Hawaii, and a detachment recently established at the island of Midway, Pacific Ocean, all of whose accounts appear to be in a sense affected by the above-cited laws. These accounts are being credited for payment, or for certificate for payment, by the undersigned, with the increased pay described in the act of June 30, 1902, and payment of the amounts so credited is pending at this office. An application to these cases of the principles enunciated by your office in its decisions of June 25, 1900 (6 Comp., 952); August 19, 1902 (Cir. No. 39, headquarters Army, Aug. 27, 1902); March 26, 1903 (9 Comp., 527); and in the decision of April 13, 1903 (9 Comp., 553), has created a doubt at this office respecting the propriety of the future payment of this increased pay to these officers and enlisted men from the date of the approval of the recent Army appropriation act, to wit, *April 23, 1904*.

From such discussion of this subject as appeared in public prints at the time this act was under consideration, this office believes that it was the intention of the Congress to discontinue by this enactment the foreign-service pay for service at Porto Rico, Cuba, and Hawaii; it is not understood that the matter of discontinuing this pay for service of the Marine Corps at the island of Midway was ever considered by the Congress. While the undersigned recognizes that it is the duty of your office to consider and decide this matter solely from the legal point of view and to allow only what the law allows, this office is constrained to state here a belief that if there be any service that merits an increased compensation such service will be found at the island of Midway.

4. I have the honor to request the decision of your office as to whether the enactment of April 23, 1904 (33 Stat., 266), above cited, has operated to repeal the provisions of the act of June 30, 1902, as quoted, so far as officers and enlisted men of the Marine Corps payable by this office and serving at the stations named are concerned; and if so, from what date should this office discontinue the credit and payment to such officers and enlisted men whose pay you may determine to be affected by this recent legislation.

Very respectfully,

GEORGE RICHARDS,
*Lieutenant Colonel, Assistant Paymaster,*
*United States Marine Corps.*

The COMPTROLLER OF THE TREASURY,
*Treasury Department, Washington, D. C.*

(Through the Brigadier General Commandant, Headquarters U. S. Marine Corps, Washington, D. C.)

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## APPENDIX B.

[13 Comp., 33–37.]

INCREASED PAY TO OFFICERS AND ENLISTED MEN OF MARINE CORPS FOR SERVICE IN PORTO RICO, HAWAII, AND MIDWAY.

Commissioned officers and enlisted men of the Marine Corps serving in Porto Rico (including the island of Culebra) and Hawaii during the fiscal year ending June 30, 1907, are excepted by the act of June 12, 1906, from the class of beneficiaries provided by the act of June 30,

1902, and are not entitled to the increased pay provided by that act for service beyond the limits of the States comprising the Union and the Territories of the United States contiguous thereto.

Commissioned officers and enlisted men of the Marine Corps serving at stations in the island of Midway are not excepted by the act of June 12, 1906, from the class of beneficiaries provided by the act of June 30, 1902, and are entitled to the increased pay provided by that act for service beyond the limits of the States comprising the Union and the Territories of the United States contiguous thereto, said island not being a part of Hawaii.

*Assistant Comptroller Mitchell to the Secretary of the Navy, July 21, 1906:*

I have received by your reference, with request for decision of the question therein presented, the following letter, dated June 26, 1906, from Col. G. C. Goodloe, paymaster, United States Marine Corps:

1. This office has this date addressed the following communication to the assistant paymaster, United States Marine Corps, Berkeley, Cal.:

"1. This office is in receipt of your telegram, dated the 26th instant, as follows:

"'Marine Corps, for paymaster, Washington, D. C.

"'Under Army appropriation act am withholding from June 12 increased pay, foreign service, marines, Honolulu.—Powell, A. P. M.'"

2. Your attention is invited to the decision of the Comptroller of the Treasury, dated June 22, 1904 (10 Comp. Dec., 849), which, as this office understands it, has set at rest the question as to whether the foreign-service pay of officers and enlisted men of the Marine Corps is governed by such limitations of the amounts of money appropriated as may be contained in acts making appropriations for the support of the Army, unless in the language of the act contemplated there is contained in specific terms an express repeal of the statutes which have theretofore granted this increase. This office sees nothing in the act approved June 12, 1906, making appropriations for the support of the Army for the fiscal year ending June 30, 1907, which can be construed as such a repeal of the act of March 2, 1901 (31 Stat., 903), but if such should be otherwise, it remains clear that the act of March 3, 1901 (31 Stat., 1108), at least has not been repealed. This later enactment contains a specific grant to the Marine Corps of that which was authorized by the prior act under the terms of section 1612, Revised Statutes, and, as this office understands the law, even though the former act may be specifically repealed, which is not admitted, the officers and enlisted men of the Marine Corps may continue to

properly receive the foreign-service pay authorized by the later law until such be likewise repealed. You are therefore directed to continue to pay the foreign-service pay heretofore authorized for the officers and enlisted men of the Marine Corps serving in Hawaii until the Comptroller of the Treasury may in specific terms decide that such is not in accordance with his view of the law.

2. It is respectfully suggested that the question therein presented, which this office has conditionally passed upon, may be submitted to the department with the recommendation that the Secretary of the Navy request a decision thereon by the Comptroller of the Treasury, which decision is desired for the guidance of the paymaster's department of the corps in future payments of foreign-service pay under the jurisdiction of the Navy Department, not only to the officers and enlisted men serving in the Hawaiian Islands, including the island of Midway, but also to those serving in the island of Porto Rico, including Culebra, West Indies.

The act of June 30 ,1902 (32 Stat., 512), making appropriation for the support of the Army for the fiscal year 1903, provides:

For additional twenty per centum increase on pay of enlisted men, one million seven hundred and seventy-one thousand four hundred and eighty dollars and thirty-four cents.

For additional ten per centum increase on pay of commissioned officers serving at foreign stations, four hundred and fifty-one thousand four hundred and fifty-six dollars: *Provided*, That hereafter the pay proper of all commissioned officers and enlisted men serving beyond the limits of the States comprising the Union and the Territories of the United States contiguous thereto shall be increased ten per centum for officers and twenty per centum for enlisted men over and above the rates of pay proper as fixed by law for time of peace, and the time of such service shall be counted from the date of departure from said States to the date of return thereto.

The act of April 23, 1904 (33 Stat., 266), making appropriations for the support of the Army for the fiscal year 1905, provides:

For additional twenty per centum increase on pay of enlisted men serving in the Philippine Islands, the island of Guam, Alaska, China, and Panama, five hundred and thirty-three thousand four hundred and twelve dollars and fifty-one cents.

For additional ten per centum increase on pay of commissioned officers serving in the Philippine Islands, the island of Guam, Alaska, China, and Panama, one hundred and sixty-seven thousand four hundred and twenty-six dollars and thirty cents; * * * and all laws or parts of laws inconsistent with the provisions of this act are hereby repealed.

The act of June 12, 1906 (34 Stat., 247), Public, No. 224, making appropriation for the support of the Army for the fiscal year 1907, provides:

For additional twenty per centum increase on pay of enlisted men serving beyond the limits of the States comprising the Union and the Territories of the United States contiguous thereto (excepting Porto Rico and Hawaii), as provided by act approved June thirtieth, nineteen hundred and two, the time of such service to be counted from the date of departure from said States to the date of return thereto, five hundred and forty thousand three hundred and sixty-nine dollars and forty-eight cents.

For additional ten per centum increase on pay of commissioned officers serving beyond the limits of the States comprising the Union and the Territories of the United States contiguous thereto (excepting Porto Rico and Hawaii), as provided by act approved June thirtieth, nineteen hundred and two, the time of such service to be counted from the date of departure from said States to the date of return thereto, two hundred thousand two hundred and one dollars and thirty-nine cents: *Provided*, That the appropriations for the pay of the Army for the fiscal years ending June thirtieth, nineteen hundred and five, and June thirtieth, nineteen hundred and six, shall be available for the payment of the increase for service at foreign stations to which commissioned officers and enlisted men are entitled under the provisions of the act of June thirtieth, nineteen hundred and two. * * *

By section 1612 of the Revised Statutes, officers and enlisted men of the Marine Corps are entitled to the same pay as or may be provided by law for officers and enlisted men of like grades in the Infantry of the Army, and by virtue of said section and the act of March 3, 1901 (31 Stat., 1108), they are entitled to the increase of pay provided by the act of June 30, 1902.

The act of April 23, 1904, which provided for an increase in the pay of commissioned officers and enlisted men of the Army serving in the Philippine Islands, Guam, Alaska,

China, and Panama did not operate as a repeal of the provision in the act of June 30, 1902, for an increase in the pay of commissioned officers and enlisted men of the Army serving beyond the limits of the United States; and therefore commissioned officers and enlisted men of the Marine Corps serving beyond the limits of the United States are entitled under the act of March 3, 1901, to the increased pay provided for by said act of June 30, 1902.

The act of June 30, 1902, declared that commissioned officers and enlisted men of the Army serving at stations beyond the limits of the States comprising the Union and the Territories of the United States contiguous thereto should receive the higher rate of pay, without limitation as to time. The act of April 23, 1904, without in any way referring to the act of June 30, 1902, made an appropriation to pay the higher rate of pay to commissioned officers and enlisted men serving at the particular places therein named, and it was held in the above decision that the latter act was not inconsistent with or repugnant to the act of June 30, 1902. In other words, the mere fact that Congress by the act of April 23, 1904, appropriated to pay the higher rate of pay to said officers and men serving in the places therein named did not abrogate or repeal the above provision of the act of June 30, 1902.

The act of April 23, 1904, did not refer to or mention the act of June 30, 1902, and it covered but a part of the subject matter of the act of June 30, 1902.

The act of June 12, 1906, covers the whole subject matter of the act of June 30, 1902, expressly refers to, and I am of opinion it is a limitation upon that act. I am of opinion that by the act of June 12, 1906, Congress intended to revise the class of beneficiaries as provided by the act of June 30, 1902, and to except therefrom all commissioned officers and enlisted men serving at stations in Porto Rico and Hawaii. In other words, by the act of June 12, 1906, for the fiscal year ending June 30, 1907, commissioned officers and enlisted men serving in Porto Rico and Hawaii are excepted from the class of beneficiaries provided by the act of June 30, 1902, and are not entitled to said higher rate of pay.

I am also of opinion that commissioned officers and enlisted men of the Marine Corps serving in Porto Rico, in-

cluding the island of Culebra as part of Porto Rico, and Hawaii during the fiscal year ending June 30, 1907, are not entitled for such service to the increased pay provided by the act of June 30, 1902. I am also of opinion that commissioned officers and enlisted men of the Marine Corps serving at stations in the island of Midway are entitled for such service to said higher pay, for the reason that, as I understand, said island is not a part of Hawaii.

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## APPENDIX C.

[14 Comp., 841–846.]

REENLISTMENT GRATUITY FOR REENLISTMENT IN PORTO RICO PROVISIONAL REGIMENT, FOREIGN-SERVICE PAY FOR SERVICE IN PORTO RICO AND HAWAII, AND EXTRA PAY FOR SERVICE ON ALASKAN CABLE AND TELEGRAPH SYSTEM IN ALASKA.

* * * * *

The increase of pay provided by the act of May 11, 1908, for foreign service of officers and enlisted men of the Army during the fiscal year 1900, is not payable to officers and enlisted men of the Regular Army and of the Porto Rico Provisional Regiment for service in Porto Rico and Hawaii after June 30, 1908.

* * * * *

The act of June 30, 1902 (32 Stat., 512), making appropriation for the support of the Army for the fiscal year 1903, provides:

For additional twenty per centum increase on pay of enlisted men, one million seven hundred and seventy-one thousand four hundred and eighty dollars and thirty-four cents.

For additional ten per centum increase on pay of commissioned officers serving at foreign stations, four hundred and fifty-one thousand four hundred and fifty-six dollars: *Provided*, That hereafter the pay proper of all commissioned officers and enlisted men serving beyond the limits of the States comprising the Union and the Territories of the United States contiguous thereto shall be increased ten per centum for officers and twenty per centum for enlisted men over and above the rates of pay proper as fixed by law for time of peace, and the time of such service shall be counted from the date of departure from said States to the date of return thereto.

The act of June 12, 1906 (34 Stat., 247), making appropriation for the support of the Army for the fiscal year 1907, provides:

For additional twenty per centum increase on pay of enlisted men serving beyond the limits of the States comprising the Union and the Territories of the United States contiguous thereto (excepting Porto Rico and Hawaii), as provided by act approved June thirtieth, nineteen hundred and two, the time of such service to be counted from the date of departure from said States to the date of return thereto, five hundred and forty thousand three hundred and sixty-nine dollars and forty-eight cents.

For additional ten per centum increase on pay of commissioned officers serving beyond the limits of the States comprising the Union and the Territories of the United States contiguous thereto (excepting Porto Rico and Hawaii), as provided by act approved June thirtieth, nineteen hundred and two, the time of such service to be counted from the date of departure from said States to the date of return thereto, two hundred thousand two hundred and one dollars and thirty-nine cents: *Provided*, That the appropriations for the pay of the Army for the fiscal years ending June thirtieth, nineteen hundred and five, and June thirtieth, nineteen hundred and six, shall be available for the payment of the increase for service at foreign stations to which commissioned officers and enlisted men are entitled under the provisions of the act of June thirtieth, nineteen hundred and two. * * *

The act of March 2, 1907 (34 Stat., 1164), making appropriation for the support of the Army for the fiscal year 1908, contains a provision identical in terms with the act of June 12, 1906, except as to the amount appropriated.

In 13 Comp. Dec. 33, it was held that commissioned officers and enlisted men serving in Porto Rico and Hawaii during the fiscal year 1907 were excepted by the act of June 12, 1906, *supra*, from the class of beneficiaries provided by the act of June 30, 1902, *supra*, and were not entitled during said fiscal year to the increase of pay provided by said act of June 30, 1902, for service beyond the limits of the States comprising the Union and the Territories of the United States contiguous thereto. The same exception applies to men serving in said places during the fiscal year 1908.

The act of May 11, 1908 (Public, No. 112, pp. 6, 10), making appropriation for the support of the Army for the fiscal year 1909 provides:

* * * That increase of pay for service beyond the limits of the States comprising the Union and the Territories of the United States contiguous thereto shall be as now provided by law. * * *

For additional ten per centum increase on pay of officers on foreign service, two hundred and eighty-five thousand dollars.

For additional twenty per centum increase to enlisted men on foreign service, seven hundred and sixty-seven thousand dollars. * * *

The increase of pay for foreign service provided by law at the time of the approval of the act of May 11, 1908, was that authorized by the act of June 30, 1902, as limited by the act of March 2, 1907, making appropriation for the fiscal year 1908.

As under said laws increase of pay for foreign service was not given to commissioned officers and enlisted men serving in Porto Rico and Hawaii, such persons are not entitled to said increase of pay under the act of May 11, 1908, *supra*. The effect of the above provision in the act of May 11, 1908, is to continue the limitation imposed by the act of March 2, 1907, and under said provision I am of opinion that increase of pay for foreign service after June 30, 1908, is not payable to the officers and enlisted men of the Regular Army and the officers and men of the Porto Rico Provisional Regiment of Infantry serving in Porto Rico and Hawaii.

QUESTION 3.

The foreign service increase pay law in force is the act of June 30, 1902 (quoted above), as limited by the act of March 2, 1907, quoted, which limitation is continued in the act of May 11, 1908, under consideration. These laws are quoted and discussed under question two. The excepted places noted in the appropriation act of March 2, 1907, are Porto Rico and Hawaii.

Without determining whether the proviso in the act of March 2, 1901, quoted by the Paymaster General of the Army, is still in force, I think it evident that Congress intended by the provisions of the act of May 11, 1908, quoted by the Paymaster General, that for the fiscal year 1909 enlisted men of the line of the Army and enlisted men of the Signal Corps

of the Army employed in the Territory of Alaska on the Alaskan cable and telegraph system should, under the conditions named in the act, have extra pay as therein provided, notwithstanding such persons may at the same time be receiving or entitled to receive increase pay for foreign service under the laws providing therefor. The third question is answered accordingly.

O

# UNITED STATES *v.* VULTE.

APPEAL FROM THE COURT OF CLAIMS.

No. 256. Argued March 10, 1914; Restored to docket for reargument April 6, 1914; Reargued April 21, 22, 1914.—Decided May 4, 1914.

A statute which fixes the annual salary of a public officer at a designated sum without limitation as to time is not abrogated or suspended by subsequent enactments which merely appropriate a less amount for that officer for particular years and which contain no words expressly, or by clear implication, modifying or repealing the previous law. *United States* v. *Langston*, 118 U. S. 389.

A provision making a special and temporary appropriation will not be construed as expressing the intent of Congress to have a general and permanent application to all future appropriations. *Minis* v. *United States*, 15 Pet. 423.

The provision in the appropriation acts of 1906 and 1907 excepting Hawaii and Porto Rico from the operation of the provision for additional pay for officers in foreign service is not to be construed as prevailing over the explicit provisions of the act of June 30, 1902, providing for such additional pay including those places, and the salary provided by law of officers on foreign service referred to in the act of May 11, 1908, is that fixed by the act of June 30, 1902.

47 Ct. Cls. 324, affirmed.

THE facts, which involve statutes regulating the amount of additional pay of officers of the United States Navy for service beyond the seas, are stated in the opinion.

*Mr. Assistant Attorney General Thompson* for the United States:

Congress had the power to repeal general salary or compensation acts through special appropriation acts. When such a repeal is claimed the question is determined by the intention of Congress. *United States* v. *Fisher*, 109 U. S. 143; *United States* v. *Mitchell*, 109 U. S. 146; *Matthews* v. *United States*, 123 U. S. 184; *Wallace* v. *United States*, 133 U. S. 180; *McKinstry* v. *United States*, 40 Fed. Rep. 519.

The army appropriation act of April 23, 1904, was intended to redefine the definition of "foreign stations" given in the act of June 30, 1902, so as to exclude Porto Rico and Hawaii; it repealed the act of June 30, 1902, to that extent. See H. Rept. No. 4644, 59th Cong., 1st Sess., p. 3, vol. 4908; H. Repts. (public), 59th Cong., 1st Sess.; S. Rept. No. 1199, 58th Cong., 2d Sess., p. 8, vol. 4573, S. Repts. (public); 38 Cong. Rec., 58th Cong., II, pt. 4, pp. 3906, 3907, and pt. 5, pp. 4406–4470; *Irwin* v. *United States*, 38 Ct. Cls. 87, 98.

The cases relied on by the Court of Claims and cited in its opinion are not opposed to this conclusion. As to *Langston* v. *United States*, 118 U. S. 389, see *Belknap* v. *United States*, 150 U. S. 588, 595; and as to *Converse* v. *United States*, 26 Ct. Cls. 6, see *Carden* v. *United States*, 45 Ct. Cls. 171, 176.

Service beyond the limits of the States comprising the Union and the Territories of the United States contiguous thereto shall be as now provided by law under the act of May 11, 1908, 35 Stat. 110, and did not include service in Porto Rico or Hawaii.

The act of June 12, 1906, having been construed by the comptroller and the act of May 11, 1908, having been prepared with reference to the act of 1906, so far as the definition of foreign stations was concerned, must necessarily refer back to the territorial definition of foreign stations as set forth in the act of 1906 and as construed by the comptroller. *Sessions* v. *Romadka*, 145 U. S. 41, 42; *Claflin & Others* v. *Commonwealth Ins. Co.*, 110 U. S. 81; *The "Abbotsford,"* 98 U. S. 440; *Plummer* v. *United States*, 224 U. S. 137, 140.

The army appropriation acts of 1909, 1910, and 1911, respectively, simply make appropriation for services outside the limits of the United States and the Territories contiguous thereto in conformity with existing law as construed by the comptroller.

Since the passage of the act of 1906, the accounting officers of the Treasury have uniformly disallowed increased pay for service in Porto Rico and Hawaii. Such contemporaneous, uniform, and continuous construction is, we submit, entitled to great weight and should not be overruled without cogent reasons. *Brown* v. *United States*, 113 U. S. 568; *Schells, Executor*, v. *Fouche*, 138 U. S. 562; *Hewitt* v. *Shultz*, 180 U. S. 139; *United States* v. *Healey*, 160 U. S. 136; *United States* v. *Sweet*, 189 U. S. 471. When such construction has been approved by Congress, as was done by the act of 1912, it is conclusive.

*Mr. George A. King*, with whom *Mr. William B. King* was on the brief, for appellee.

MR. JUSTICE MCKENNA delivered the opinion of the court.

The appellee, Nelson P. Vulte, filed a petition in the Court of Claims claiming to be entitled to $299.78, being ten per cent. of his regular pay for service beyond the seas. Judgment was entered in his favor for that amount, and the United States prosecuted this appeal.

The court found the following facts: Vulte was appointed second lieutenant in the Marine Corps June 30, 1903, and was promoted to first lieutenant March 3, 1904. Under orders assigning him for duty in Porto Rico with station at San Juan, he sailed from New York for Porto Rico June 27, 1908, and served there until November 3, 1909, when he was detached and ordered back to the United States. He was four days on the return voyage.

If it is held that he is entitled to ten per cent. for services in Porto Rico from the date of sailing from New York until the date of his detachment from duty at San Juan, there would accrue to him the sum of $296.72, and

an additional sum of $3.06 if entitled to pay en route from Porto Rico to New York.

Vulte's pay was originally fixed by § 1612 of the Revised Statutes as follows: "The officers of the Marine corps shall be entitled to receive the same pay and allowances, and the enlisted men shall be entitled to receive the same pay and bounty for reënlisting, as are or may be provided by or in pursuance of law for the officers and enlisted men of like grades in the Infantry of the Army."

On June 30, 1902, as part of the appropriation act for the Army (c. 1328, 32 Stat. 507, 512), Congress modified existing law respecting the pay proper of officers of this grade by the following language: "For additional ten per centum increase on pay of commissioned officers serving at foreign stations, four hundred and fifty-one thousand, four hundred and fifty-six dollars: *Provided*, That hereafter the pay proper of all commissioned officers and enlisted men serving beyond the limits of the States comprising the Union and the Territories of the United States contiguous thereto shall be increased ten per centum for officers and twenty per centum for enlisted men over and above the rates of pay proper as fixed by law for time of peace, and the time of such service shall be counted from the date of departure from said States to the date of return thereto."

As observed by Mr. Justice Booth, delivering the opinion of the Court of Claims: "Thus far the rights of plaintiff [Vulte] respecting pay are obvious; the complications arise by subsequent legislation."

On June 12, 1906, Congress provided—"for additional ten per centum increase on pay of commissioned officers serving beyond the limits of the States comprising the Union and the Territories of the United States contiguous thereto (excepting Porto Rico and Hawaii) as provided by act of June thirtieth, nineteen hundred and two, the time of such service to be counted from the date of departure

from said States to the date of return thereto . . ." (c. 3078, 34 Stat. 240, 247).

This provision of the act of June 12, 1906, was repeated in the appropriation act of March 2, 1907, c. 2551, 34 Stat. 1158, 1164.

The act of May 11, 1908, provided as follows: "That increase of pay for service beyond the limits of the States comprising the Union and the Territories of the United States contiguous thereto shall be as now provided by law.

* * * * * * * *

"For additional ten per centum increase on pay of officers on foreign service, two hundred and eighty-five thousand dollars.

* * * * * * * *

"That nothing herein contained shall be construed so as to reduce the pay or allowances now authorized by law for any officer or enlisted man of the Army; and all laws or parts of laws inconsistent with the provisions of this act are hereby repealed." C. 163, 35 Stat. 106, 110, 114.

The short point in the case is to what the words "shall be as now provided by law" in the act of May 11, 1908, refer—whether to the acts of 1906 and 1907, or more limitedly, we may say, to the exceptions of Porto Rico and Hawaii in those acts, or to the proviso in the act of June 30, 1902, *supra*. In other words, whether the exceptions of those years of those special places shall prevail over the substantive provision of the act of June 30, 1902, *supra*, which is explicit, of enduring effect, and is besides comprehensive of all foreign stations, its language being—"That hereafter the pay proper of all commissioned officers . . . serving beyond the limits of the States . . . shall be increased ten per centum. . . ."

The Government contends for the exceptions as constituting new law, not as a temporary condition under an

old one. The claimant contends for the proviso of the act of 1902, and counsel, in quite elaborate arguments, have supported their respective contentions. We shall not follow the details of their arguments. The question presented, we think, is in brief compass. Congress manifestly did not think that by the first instance of the exception, that in the act of 1906, it had done more than temporarily suspend as to Porto Rico and Hawaii the act of June 30, 1902. The exception was repeated in 1907. If the first exception was not intended to affect permanently the act of 1902, why should such intention be ascribed to the second exception—or to both, neither having words of prospective extension, and, without such words, naturally having only temporary operation? It would be extreme to say that by making them Congress considered that it had established a policy which could be confidently referred to as having the status and effect of permanent law.

The exceptions, it is to be remembered, were in appropriation acts and no words were used to indicate any other purpose than the disbursement of a sum of money for the particular fiscal years. This court has had occasion to deal with such instances of legislation and their intended effect on existing law. In *United States* v. *Langston*, 118 U. S. 389, 394, it was decided that a statute which fixed the annual salary of a public officer at a designated sum without limitation as to time is not abrogated or suspended by subsequent enactments which merely appropriate a less amount for that officer for particular years, and which contained no words that expressly or by clear implication modified or repealed the previous law. See also *Minis* v. *United States*, 15 Pet. 423, 445, where it is said: "It would be somewhat unusual to find engrafted upon an act making special and temporary appropriation, any provision which was to have a general and permanent application to all future appropriations.

Nor ought such an intention on the part of the legislature to be presumed, unless it is expressed in the most clear and positive terms, and where the language admits of no other reasonable interpretation." This follows naturally from the nature of appropriation bills, and the presumption hence arising is fortified by the rules of the Senate and House of Representatives.

The ruling in the *Langston* and *Minis Cases* is not opposed by the cases cited by the Government. In all of them there was something more than the mere omission to appropriate a sufficient sum. There were expressions indicating a broader purpose. In two of them, *United States* v. *Fisher*, 109 U. S. 143, and *United States* v. *Mitchell*, 109 U. S. 146, it was intimated that the law was only suspended for the particular years. In another, *Wallace* v. *United States*, 133 U. S. 180, it was held that the appropriation constituted the law which prescribed the compensation of the office. And in all of them the *Langston Case* was referred to and not disturbed or modified.

*Judgment affirmed.*